Supreme Court, U.S.
FILED
APR 28 1986
JOSEPH F. SPANIOL, JR.
CLERK

85-1773

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

CHARLES M. OBERLY, III and JOHN E. WILSON, III,
Appellants,

v.

THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL.,
Appellees.

JURISDICTIONAL STATEMENT

On Appeal from the United States Court
Of Appeals for the Third Circuit

CHARLES M. OBERLY, III
Attorney General

FRED S. SILVERMAN
State Solicitor

JOHN J. POLK
Deputy Attorney General
Department of Justice
Carvel State Building
Wilmington, Delaware 19801

COUNSEL FOR APPELLANTS

PACKARD PRESS / LEGAL DIVISION, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

QUESTION PRESENTED

May a federal district court invalidate a state law under the preemption doctrine by relying on the Environmental Protection Agency's failure to promulgate an applicable regulation when Congress has stated that preemption occurs only "after the effective date of a regulation?" [1]

THE PARTIES

Charles M. Oberly, III, Attorney General of the State of Delaware, and John E. Wilson, III, Secretary of the Department of Natural Resources and Environmental Control of the State of Delaware, ("the State Officials") are the appellants in this appeal. They were also the appellants before the United States Court of Appeals for the Third Circuit whose judgment is sought to be reviewed.

---

1. Prior to the district court's decision in this case, the Delaware Noise Control Act, 7 *Del. C.* c.71, condemned excessive noise in residential neighborhoods. Unfortunately for the people of Elsmere, Delaware, they lived near a railyard operated by railroads of the Chessie System. Some lived as close to the site as 100 yards. The residents and the railroad had coexisted in peace for more than 100 years. In October 1982, however, the railroads changed the character of the site. They converted the site into a terminal for "piggyback operations" and, in so doing, caused large numbers of refrigerated trailers to be parked in areas adjacent to the residential properties. One affiant compared the noise from these trailers to "standing next to a highway as a stream of trucks passed in incessant review." A-94. When state law enforcement officials attempted to enforce the Delaware Noise Control Act, a federal district court decreed that the law violated the Constitution. The court reasoned that the Environmental Protection Agency ("EPA") had considered but failed to enact federal standards governing noise from stationary refrigerated trailers. In so doing, the court concluded that the EPA had preempted all state regulation of such noise by its non-regulation. Delaware challenges that ruling as oxymoronic. Congress had conferred preemptive authority on existing federal regulations, not those which the EPA failed to bring into existence. For these reasons, the appellants consider questions concerning the EPA's failure to enact an applicable regulation subsidiary to the articulated question. *See* Supreme Court Rule 15.1(a).

The appellees here and below are the Baltimore & Ohio Railroad Company, the Baltimore & Philadelphia Railroad Company, Mount Clare Properties (Delaware), Inc., and Chessie Motor Express ("the Chessie group").

At the request of the Third Circuit, the General Counsel of the EPA, or more precisely, the Land and Natural Resources Division of the United States Department of Justice submitted a memorandum of law addressing the EPA's position concerning the preemptive effect of 42 U.S.C. §4916. *See Baltimore & Ohio Railroad v. Oberly*, 782 F.2d 29, 30 (3rd Cir. 1986). The EPA is not, however, a party of record in this proceeding.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
THE PARTIES	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
1. Facts Material To The Consideration Of The Question Presented	3
a. The Chessie Group's Operation	3
b. Regulatory History	4
2. The Course Of Proceedings And Disposition In The Courts Below	7
REASONS THIS COURT SHOULD GRANT PLENARY CONSIDERATION OF THE QUESTION PRESENTED	9
I. THIS CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW INVOLVING THE PRINCIPLES OF FEDERALISM AND REPUBLICANISM	9
A. The Threat To Federalism	9
B. The Threat To Republicanism	12
II. THE LOWER FEDERAL COURTS LACK A UNIFORM APPROACH TO THE APPLICATION OF THE HOLDING IN *RAY V. ATLANTIC RICHFIELD*	13
III. THE DECISION BELOW IS INCORRECT	14
CONCLUSION	16

TABLE OF AUTHORITIES

Cases: Page

Arkansas Electric Cooperative Corp v. Arkansas Public Commission, 461 U.S. 375 (1983) 9, 10, 11

Association of American Railroads v. Costle, 562 F.2d 1310 (D.C.Cir. 1977) 5, 6, 12

Baltimore & D.C. W. Ry. Co. v. Little, 48 N.E. 862 (Ind. Supr. 1897) 3

Baltimore & Ohio Railroad Company v. Oberly, 606 F.Supp. 1340 (D.Del. 1985) 1, 7, 8, 11

The Baltimore & Ohio Railroad v. Oberly, 782 F.2d 29 (3rd Cir. 1986) ..... ii, 1, 8, 11

Brown v. Hotel and Restaurant Employees and Bartenders, 104 S.Ct. 3179 (1984) 9, 14

Capital Cities Cable, Inc. v. Crisp, 104 S.Ct. 2694 (1984) 9, 10

City of Milwaukee v. Illinois and Michigan, 451 U.S. 304 (1981) 13

Fidelity Federal Savings and Loan Association v. de la Cuesta, 458 U.S. 141 (1982) 9, 11

First Federal Savings & Loan Ass'n of Gadsden County v. Peterson, 516 F.Supp. 732 (N.D.Fla. 1981), *rev'd for want of subject matter jurisdiction*, 707 F.2d 1217 (11th Cir. 1983) 14

Florida Lime and Avocado Growers v. Paul, 373 U.S. 132 (1963) 9

Grand Canyon Dories, Inc. v. Idaho Outfitters & Guides Bd., 709 F.2d 1250 (9th Cir. 1983) 13

Green v. River Terminal Railway Co., 585 F.Supp. 1019 (N.D. Ohio E.D. 1984), *aff'd*, 763 F.2d 805 (6th Cir. 1985) 11, 13

TABLE OF AUTHORITIES—*(Continued)*

Cases: Page

Hillsborough County, Florida v. Automated Medical Laboratories, Inc., 105 S.Ct. 2371 (1985) 9

Hines v. Davidowitz, 312 U.S. 52 (1941) 9

Marshall v. Burlington Northern, Inc., 720 F.2d 1149 (9th Cir. 1983) 11, 13

Michigan Canners and Freezers Association, Inc. v. Agricultural Marketing and Bargaining Board, 104 S.Ct. 2518 (1984) 9

NLRB v. Nash-Finch Co., 404 U.S. 138 (1971) 10

Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978) .... passim

Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1946) ... 9

Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983) 1

Silkwood v. Kerr-Mcgee Corporation, 464 U.S. 238 (1984) 9

Constitution:

U.S.Const. art. VI, cl. 2. 1

Statutes:

28 U.S.C. §1254(2) 1

28 U.S.C. §1291 1

28 U.S.C. §1291(a)(1) 1

28 U.S.C. §1331 1

33 U.S.C. §§1221 *et seq.* (1970 ed., Supp V), Ports and Waterways Safety Act of 1972 .....9, 10

42 U.S.C. §4916(c) ..... passim

46 U.S.C. §§1451-89, Federal Boating Safety Act of 1971. 13

7 *Del. C.* §7101 *et seq.*, Delaware Noise Control Act . i, 1, 2, 4, 7

TABLE OF AUTHORITIES—*(Continued)*

	Page
Statutes:	
Idaho Code §§36-2101-2118 (1977 & Supp 1982), Idaho's Outfitters & Guides Act	13
Legislative History:	
118 Cong.Rec. 37318 (1972), *reprinted in*, A Legislative History of the Noise Control Act of 1972 at 40 (1974)	15
Regulatory Provisions:	
40 C.F.R. §§201.11-.16	7
39 Fed.Reg. 24581	5
39 Fed.Reg. 24586	5
39 Fed.Reg. 24580-24586	5
39 Fed.Reg. 24580-24581	12
41 Fed.Reg. 2184-2195	5
44 Fed.Reg. 22960	6
44 Fed.Reg. 22967-22970	6
47 Fed.Reg. 54108	6, 7
47 Fed.Reg. 54107-54108	6
Law Review Articles:	
Sunstein, *Naked Preferences and the Constitution*, 84 Colum.L.Rev. 1689 - 1732 (1984)	12
Other:	
Webster's New Twentieth Century Dictionary 1845 (2d ed. 1959)	3

OPINIONS BELOW

In a three page opinion dated January 27, 1986, the United States Court of Appeals for the Third Circuit affirmed the district court's invalidation of the Delaware Noise Control Act, 7 *Del. C.* c.71. The opinion is reported as *The Baltimore & Ohio Railroad v. Oberly*, 782 F.2d 29 (3rd Cir. 1986).

The district court had enjoined the State officials from enforcing that Act on April 9, 1985. That court's decision appears as *Baltimore & Ohio Railroad Company v. Oberly*, 606 F.Supp. 1340 (D.Del. 1985). The court had declared the Act unconstitutional in the context of the Chessie group's motion for a preliminary injunction. At oral argument before the Third Circuit, however, the parties stipulated on the record that the court should consider the issue as if it had been appealed from an order imposing a permanent injunction. Appendix ("A- ") 24. The court accepted that stipulation.

JURISDICTION

A federal district court has enjoined state law enforcement officials from enforcing the Delaware Noise Control Act on the grounds that it violates the Supremacy Clause of the Constitution of the United States.[2] Thus this Court has jurisdiction of this appeal under 28 U.S.C. §1254(2).

Jurisdiction in the district court rested on federal question jurisdiction under 28 U.S.C. §1331. *See Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n. 14 (1983).

The Third Circuit assumed jurisdiction over the appeal from the grant of a preliminary injunction pursuant to 28 U.S.C. §1291(a)(1). Once the parties conceded that the Third Circuit could treat the matter as if appealed from an order imposing a permanent injunction, the continued jurisdiction of the court of appeals rested on 28 U.S.C. §1291.

The Third Circuit issued its opinion and order on January 27, 1986. A-18. The State Officials filed their notice of appeal

2. The Supremacy Clause reads: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land." U.S.Const. art. VI, cl. 2.

with the United States Court of Appeals for the Third Circuit on April 11, 1986. A-23.

STATUTES INVOLVED

There are two statutes involved in this appeal: 42 U.S.C. §4916(c) and 7 *Del. C.* §7101 *et seq*. The federal statute, which the lower courts considered preemptive despite the absence of a federal standard applicable to noise from parked refrigerated trailers, states:

> (1) Subject to paragraph (2) but notwithstanding any other provision of this chapter, after the effective date of a regulation under this section applicable to noise emissions resulting from the operation of any equipment or facility of a surface carrier engaged in interstate commerce by railroad, no State or political subdivision thereof may adopt or enforce any standard applicable to noise emissions resulting from the operation of the same equipment or facility of such carrier unless such standard is identical to a standard applicable to noise emissions resulting from such operation prescribed by any regulation under this section.
>
> (2) Nothing in this section shall diminish or enhance the rights of any State or political subdivision thereof to establish and enforce standards or controls on the levels of environmental noise, or to control, license, regulate, or restrict the use, operation, or movement of any product if the Administrator, after consultation with the Secretary of Transportation, determines that such standard, control, license, regulation, or restriction is necessitated by special local conditions and is not in conflict with regulations promulgated under this section.

42 U.S.C. §4916(c).

The Delaware statute and the regulations promulgated thereunder are too lengthy to be reproduced in this jurisdictional statement. They appear in the Appendix at A-25, 39.

STATEMENT OF THE CASE

1. Facts Material To The Consideration Of The Question Presented

The facts material to consideration of the issues raised in this appeal have never been in dispute. Many of these facts relate to the Chessie group's operation which the State officials seek to regulate. The parties stipulated to most of those facts which appear in this jurisdictional statement. A-51-76. The remaining facts consist of the regulatory history concerning the promulgation of federal railroad noise emissions standards by the Environmental Protection Agency ("EPA"). The regulatory history, of course, is a matter of undisputed public record.

a. The Chessie Group's Operation

Prior to December, 1983, the Baltimore & Ohio and the Baltimore & Philadelphia Railroads used a site adjacent to the residential communities of Elsmere, Roselle, and Brack-Ex as a switching yard.[3] This site was known as the Wilsmere Yard. Noise from switching operations might include sound from the movement of locomotives and railcars, from the application of retarders to railcar movement, and from the coupling of railcars. These operations are limited in duration. As a result, the noise from these operations is intermittent.

In October, 1982, the Chessie group began increasingly to use the Wilsmere Yard for intermodal operations. These operations involve the transfer of trailers to and from railroad flat cars. In the railroad industry, such operations are known by the acronyms TOFC and COFC.[4]

The Chessie group's intermodal operation at the Wilsmere yard follows typical TOFC/COFC procedures. Truck-tractors operated by either Chessie Motor Express or some other trucking firm haul trailers or containers to parking areas alongside the

3. A switching yard or switchyard consists of several side tracks on which railcars from arriving trains are separated and from which railcars for departing trains are collected. *See* Webster's New Twentieth Century Dictionary 1845 (2d ed. 1959); *Baltimore & D.C. W. Ry. Co. v. Little*, 48 N.E. 862, 863 (Ind. Supr. 1897).

4. TOFC stands for "trailer on flat car"; COFC. for "container on flat car."

railroad tracks. At Wilsmere these parking areas are along the north side of the railroad tracks. That is the side closest to the neighboring communities. The trailers, including refrigerated trailers, sit in these parking areas awaiting outbound shipment.

Since the refrigerated trailers contain perishable merchandise, the refrigeration units on these trailers must be operated while the trailers sit in the parking areas. The noise from these units, when aggregated, can be considerable. One investigator equated it "to the noise one would hear standing next to a highway as a stream of trucks passed in incessant review." A-94.

Moreover large numbers of refrigerated trailers accumulate in the parking areas. The peak number of refrigerated trailers handled daily at the Wilsmere yard is 120. A-88. For the twelve month period from August 1, 1983 through July 31, 1984, a total of 8,113 refrigerated trailers moved in and out of the Wilsmere yard. A-69. On average, these trailers leave the yard in three hours. Some, however, remain there as long as three days. A-85.

In May and June, 1984, following complaints from neighbors of the Wilsmere Yard, an investigator took measurements of the noise emissions from the refrigerated trailers. He concluded that the noise exceeded levels permitted under the regulations adopted pursuant to the Delaware Noise Control Act, 7 *Del. C.* §7101 *et seq*. On August 14, 1984, Secretary Wilson advised lawyers representing the Chessie group that the Delaware Department of Justice intended to file an action against the Chessie group to enforce Delaware's noise regulations.

b. Regulatory History

An awareness of the circumstances surrounding the promulgation of regulations by the EPA pursuant to 42 U.S.C. §4916(c) is critical to consideration of the issues presented by this appeal. Those circumstances demonstrate that the EPA withdrew proposed regulations governing noise emissions from parked refrigerated trailers not because it believed that such noise was best left unregulated but because it wished to settle a lawsuit brought against it by the American Association of Railroads ("AAR"). Direction from this Court is needed to clarify whether, under such circumstances, the EPA's decision not to regulate constitutes

preemption and therefore precludes state regulation of such noise.

The EPA published proposed emission standards for railroad operations on July 3, 1974. 39 Fed.Reg. 24580-24586. Initially, the EPA did not think that all railroad operations required nationally uniform standards. It explained that "railroad terminals and yards are normally permanent installations." 39 Fed.Reg. 24581. Noise from these facilities could be reduced by many methods which do not require national uniformity. *Id*. The agency reasoned that there was no need for nationally uniform treatment of such facilities.[5]

As a result, the EPA proposed only three federal noise standards. These initial proposals governed noise from moving locomotives, stationary locomotives and rail car operations. 39 Fed.Reg. 24586. The EPA published these proposals as final railroad noise emission standards on January 14, 1976. 41 Fed.Reg. 2184-2195.

This regulatory scheme was stillborn. In a lawsuit against the agency, AAR, an organization which promotes the interests of railroads, challenged the scope of EPA compliance with the congressional mandate.

Association of American Railroads v. Costle, 562 F.2d 1310 (D.C. Cir. 1977) held that the EPA had not met the scope of its congressional mandate by failing to promulgate standards for railroad facilities. The court found that Congress had explicitly directed the promulgation of standards for *all* equipment and facilities and ordered the agency to promulgate additional regulations.

On April 17, 1979, the EPA issued a notice of proposed rulemaking to comply with the court order in *Costle*. The agency

5. The State officials subscribe to the view that certain railroad operations must be protected from potentially conflicting state regulations by nationally uniform standards. The aggregation of stationary refrigerated trailers is not such an operation. The environmental significance of noise from such trailers depends on the proximity of residential communities, the number of trailers stored at the facility, and the presence of natural or man-made buffers. Such noise is a local concern and, as a result, does not require nationally uniform treatment.

commented, however, on the scheme for regulation of railroad noise which it would have preferred:

> We decided that railroad facility and equipment noise, other than locomotives and railcars, was best controlled by measures which did not require national uniformity of treatment. We wanted to leave State and local authorities freedom to address site specific problems, on a case by case basis, without Federal hindrance.

44 Fed.Reg. 22960. The agency noted that the *Costle* case, however, obligated it to broaden the scope of federal regulation considerably. As a result, the regulations promulgated in the notice of April 17 "include virtually all railroad facilities and equipment." *Id.*

Those regulations covered the following equipment and facilities: moving and stationary locomotives, rail car operations, car coupling operations, retarders, and, significantly, refrigerator car operations and receiving property standards. 44 Fed.Reg. 22967-22970. Some of these standards were stringent. The property-line standard, for example, created a violation for any noise in excess of 65dB. *Id.* Inevitably, AAR protested that the agency had gone too far.

AAR filed extensive comments to the proposed standards. It objected particularly to the property-line standard. This provided the catalyst for discussions between EPA and AAR which ultimately resulted in the settlement of the lawsuit. 47 Fed.Reg. 54108. The terms of the settlement were straightforward. AAR agreed to dismiss the *Costle* suit. In turn, the EPA agreed to withdraw some of the standards which it had promulgated. On November 24, 1981, the court dismissed *AAR v. Costle.*

By notice dated December 1, 1982, the EPA withdrew the standard for noise from stationary refrigerator cars. 47 Fed.Reg. 54107-54108. In so doing, the EPA did not state that it thought such noise was best left free from all regulation. Instead, it noted:

> The standards promulgated to date cover the major sources of noise from railroad equipment which in turn generate a

> larger proportion of the noise emissions from railroad facilities. Since those standards addressed the major sources of noise from railroad operations, and since the cumulative effect of regulating equipment used within railyards is also to regulate, to a significant degree, noise emissions from rail facilities, it was agreed by the AAR, the State of Illinois and EPA that it is unnecessary for EPA to establish further property line facility emission standards.

47 Fed.Reg. 54108.[6] In a Status Report filed with the court with the Agreement to Dismiss, A-77-82, the agency commented further,

> Respondents agree with Petitioner AAR that EPA has already effectively regulated railroad "equipment and facilities" in a manner "consistent with the customary usage of the phrase in the railroad industry," 562 F.2d at 1321, and in a manner consistent with the criteria contained in Section 17 of the Noise Control Act, and that national uniformity of treatment is effectively assured as the Federal standards become effective.

A-80; reproduced at *Baltimore & Ohio Railroad Co. v. Oberly*, 606 F.Supp. at 1344.

2. The Course Of Proceedings And Disposition In The Courts Below

The Chessie Group initiated this action in the United States District Court for the District of Delaware seeking to have the Delaware Noise Control Act, 7 *Del. C.* §7101 *et seq.*, declared

---

6. Existing standards cover moving and stationary locomotives and switcher locomotives, moving rail cars, retarder operations, car coupling operations, and load cell test stands. *See* 40 C.F.R. §§201.11 — 201.16. Although they cover equipment which "generate[s] a larger proportion of the noise emissions from such facilities", these standards do not cover noise from standing refrigerated trailers. Thus these standards do not limit the contribution which refrigerated trailer noise makes to the total noise level of the railyard.

unconstitutional as applied to them. On August 17, 1984, following application by the Chessie group, the district court temporarily restrained the State officials from enforcing the Delaware Noise Control Act or regulations adopted thereunder.

Following the agreement of the parties on a factual statement, the Chessie group's application for a preliminary injunction was briefed and argued. In their brief, the State officials argued that the preliminary injunction should be denied because, among other things, the Chessie group was unlikely to demonstrate that the Delaware regulatory scheme was preempted. Specifically, the State officials contended that Congress explicitly defined the extent to which state law was preempted: "Read literally, the statute preempts state regulation of noise from the operation of equipment and facilities where that noise is covered by a federal regulation." Defendants' Opening Brief Opposing Plaintiffs' Motion For A Preliminary Injunction at 16, *Baltimore & Ohio Railroad v. Oberly*, 606 F.Supp. 1340 (D.Del. 1985).

On April 9, 1985, the district court issued an order which imposed a preliminary injunction on the State officials. The court rejected the argument stating that "the EPA expressly considered and rejected standards for those noise sources that the State of Delaware is now seeking to control." 606 F.Supp. at 1345.

The State officials appealed that decision to the United States Court of Appeals for the Third Circuit. There they repeated their literal analysis of 42 U.S.C. §4916. Brief of Appellants at 27-28, *Baltimore & Ohio Railroad v. Oberly*, 782 F.2d 29 (3rd Cir. 1986). In addition, the State officials argued that EPA's withdrawal of a proposed standard for stationary refrigerated trailers did not amount to a decision that that equipment was best left unregulated. *Id.* 31-34.

The Third Circuit heard oral argument on November 18, 1985. At argument, the court elicited an agreement from both parties that it could consider the matter as if it had been appealed from an order imposing a permanent injunction on the State officials. On January 27, 1986, the Third Circuit issued its opinion and order affirming the imposition of the injunction for the reasons recited in the opinion of the district court. 782 F.2d at 30.

REASONS THIS COURT SHOULD GRANT PLENARY CONSIDERATION OF THE QUESTION PRESENTED

I. THIS CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW INVOLVING THE PRINCIPLES OF FEDERALISM AND REPUBLICANISM.

A. The Threat To Federalism

This Court has written on many occasions, and lately with increasing frequency, on the preemption of state law by federal statutes and regulatory schemes.[7] The Court has even discussed preemption in the context of a federal administrator's decision not to regulate a particular activity. *See Arkansas Electric Cooperative Corp. v. Arkansas Public Commission*, 461 U.S. 375 (1983); *Fidelity Federal Savings & Loan Association v. de la Cuesta*, 458 U.S. 141 (1982); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 178 (1978). It has not, however, addressed the general question raised by the State officials in this appeal: under what circumstances will a federal decision to forego regulation in a particular field preclude state regulation as well.

Unlike *Arkansas Electric* and *Fidelity Federal* where the issue was not dispositive, *Ray v. Atlantic Richfield* represents the most explicit articulation of this branch of Supremacy Clause jurisprudence. In that case, there was no provision of the Ports and Waterways Safety Act of 1972 ("PWSA"), 33 U.S.C. §§1221 *et seq.* (1970 ed., Supp V), which expressly preempted states from setting standards for vessel size and speed limitations. The Court concluded, however, that §1222(b) "impliedly forbids higher state standards for vessels" because it permitted state imposition of more stringent standards "for structures only." 435

---

7. *See, e.g., Hillsborough County, Florida v. Automated Medical Laboratories, Inc.*, 105 S.Ct. 2371 (1985); *Brown v. Hotel and Restaurant Employees and Bartenders*, 104 S.Ct. 3179 (1984); *Capital Cities Cable, Inc. v. Crisp*, 104 S.Ct. 2694 (1984); *Silkwood v. Kerr-Mcgee Corporation*, 464 U.S. 238 (1984); *Michigan Canners and Freezers Association, Inc. v. Agricultural Marketing and Bargaining Board*, 104 S.Ct. 2518 (1984); *Florida Lime and Avocado Growers v. Paul*, 373 U.S. 137 (1963); *Rice v. Santa Fe. Elevator Corp.*, 331 U.S. 218 (1946); *Hines v. Davidowitz*, 312 U.S. 52 (1941).

U.S. at 174. Moreover, the legislative history of the PWSA reflected congressional intent that "Coast Guard regulation of vessels preempt[ed] state action in this field." *Id.* The Secretary of the Department of Transportation had considered the area and had promulgated regulations prohibiting the passage of more than one 70,000 DWT vessel in either direction at a given time. Since this regulation addressed the area of vessel size, the State of Washington was precluded from enacting a statute which banned operations of oil tankers in the Puget Sound in excess of 125,000 DWT. The Secretary's decision "[took] on the character of a ruling that no such regulation was appropriate." 435 U.S. at 178 (Citations omitted).

This Court mentioned, but had no need to apply, the *Atlantic Richfield* holding in *Arkansas Electric Cooperative Corp. v. Arkansas Public Commission*. The Court observed that "a federal decision to forego regulation in a given area may imply an authoritative federal determination that the area is best left unregulated, and in that event would have as much preemptive force as a decision to regulate." 461 U.S. at 384.[8]

Neither of these decisions require that every federal agency failure to regulate be given preemptive effect. Clearly, the Court did not envision the indiscriminate application of the holdings in these cases. It said as much in *Capital Cities Cable, Inc. v. Crisp*, 104 S.Ct. 2694 (1984). There Justice Brennan, writing for a unanimous Court, noted that the FCC's decision to preempt state and local regulation of cable television systems "represent[ed] a reasonable accommodation of conflicting policies." 104 S.Ct. at 2705. Relying expressly on *Ray v. Atlantic Richfield*, the *Capital Cities* Court wrote:

> And, as we have repeatedly explained, when federal officials have determined, as the FCC has here, that restrictive regulation in a particular area is not in the public interest, "States are not permitted to use their police power to enact such a regulation."

---

8. *See generally NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971) (preemption by non-regulation will only extend to those unregulated fields which Congress or the federal agency designed to be free of all regulation).

Id.

What is required, then, is an agency's affirmative determination that state regulation is not in the public interest. Nothing in the history of the regulations enacted under 42 U.S.C. §4916 indicates that the EPA meant to preclude state regulation of stationary refrigerated trailers. At the most, the EPA's withdrawal of the refrigerated trailer standard evinces a preference that no *federal* standard extend to this equipment. Yet the courts below applied the holdings of *Atlantic Richfield* and *Arkansas Electric* indiscriminately.

The District Court's analysis went no further than to conclude that "the EPA expressly considered and rejected [as unnecessary] standards for those noise sources that the State of Delaware is now seeking to control." 606 F.Supp. at 1345. The Third Circuit merely incorporated this reasoning in its decision. 782 F.2d at 30. Neither court examined why the EPA deemed the regulation unnecessary. Such an examination is essential if the holding in *Ray v. Atlantic Richfield* and *Fidelity Federal* is not to be applied as a *per se* test.

Other courts have read *Ray v. Atlantic Richfield* to impose a *per se* test. The Ninth Circuit cited that decision to interdict a jury's consideration of the effectiveness of certain warning devices on locomotives because the Federal Railroad Administration had concluded that no federal requirement of such devices was necessary. *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149, 1153-1154 (9th Cir. 1983). And *Green v. River Terminal Railway Co.*, 585 F.Supp. 1019 (N.D. Ohio E.D. 1984), *aff'd*, 763 F.2d 805 (6th Cir. 1985) relied on the *Marshall* court's reading and concluded that any state attempt to require locomotive equipment not prescribed by federal regulation will fail. 585 F.Supp. at 1027.

A *per se* test imposing preemption whenever a federal agency considers but fails to enact a regulation substantially disrupts states' efforts at self-government. Inevitably during the course of a regulatory effort targeting a particular problem both federal and state officials can be expected to consider similar responses. A *per se* test would preclude state regulation in the face of federal inaction on such a response. Incredibly preemption

could occur even when the justification for federal inaction was the federal agency's belief that state regulation was a more desirable response. Given the potential that some federal agency may have considered and rejected a proposed regulation, state regulators would find themselves stymied in their efforts to address a problem of state interest. The definitive guidance of this Court is needed to stave off this threat to our system of federalism.

B. The Threat To Republicanism

The federal railroad noise regulations which were ultimately enacted were the product of a curious process. Through its manipulation of the legal and administrative system, the Association of American Railroads ("AAR") forced the EPA to promulgate federal standards to immunize it from the state regulation which the EPA initially considered a more effective response. *See* 39 Fed.Reg. 24580-24581. The EPA then attempted to do precisely what the *AAR v. Costle* court, at the insistence of AAR, had ordered. It promulgated regulations, some of which imposed stringent standards. AAR objected to the standards but its agreement to dismiss the lawsuit proved a far more effective way to fashion the regulations to its liking. For its part, the EPA was already a reluctant regulator. Forsaking proposed federal regulations which it deemed unnecessary from the outset was a small price to buy out of a lawsuit.

The influence which AAR exerted over the promulgation of the federal railroad noise regulations strikes at the core of a representative government which espouses equality as an ideal. *See generally* Sunstein, *Naked Preferences and the Constitution*, 84 Colum.L.Rev. 1689-1732 (1984) (arguing that the varying degrees of judicial scrutiny under certain constitutional provisions reflect judicial concern that the enactment resulted from the undue influence of special interest groups). Concerns over the representative character of our government generally motivate cautious intervention by the courts. Indeed this Court has observed that "[t]he enactment of a federal rule in an area of national concern, and the decision whether to displace state law in doing so, is generally made not by the federal judiciary, purposefully insulated from democratic pressures, but by the people

through their elected representatives in Congress." *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 312-313 (1981) (Rehnquist, J.). In this case and its D.C. Circuit prelude, no similar caution informed the decisions of the courts. If the threat to our system of republicanism from the regulatory overreaching of special interest groups is to be avoided, it is respectfully submitted that this Court must voice its concern about the application of the Supremacy Clause to the facts of this case.

II. THE LOWER FEDERAL COURTS LACK A UNIFORM APPROACH TO THE APPLICATION OF THE HOLDING IN *RAY V. ATLANTIC RICHFIELD.*

The lower federal courts differ in their approach to applying this Court's holding in *Ray v. Atlantic Richfield*. Sometimes the differences appear in opinions of the same court. On other occasions, the differences occur between the circuits.

As previously noted, the Ninth Circuit imposed the holding as a *per se* rule in *Marshall v. Burlington Northern, Inc.* The Sixth Circuit did likewise in *Green v. River Terminal Railway Co.* And, in this case, the District Court and the Third Circuit approached the test in the same, indiscriminate manner.

In an earlier decision, however, the Ninth Circuit employed a case-specific analysis to a claim that the Federal Boating Safety Act of 1971, 46 U.S.C. §§1451-89 preempted Idaho's Outfitters & Guides Act, Idaho Code §§36-2101-2118 (1977 & Supp 1982). *Grand Canyon Dories, Inc. v. Idaho Outfitters & Guides Bd.*, 709 F.2d 1250 (9th Cir. 1983). There the court attached dispositive importance to the absence of any express federal action disapproving the state's statute and regulations. The Ninth Circuit read *Ray v. Atlantic Richfield* to result in preemption only when the federal regulator acts or decides that no requirement should be imposed and thereby expressly disapproves of the state scheme. 709 F.2d at 1255. The court grounded its reasoning on the literal language of the federal statute. That language permitted state regulation absent such disapproval.

Following a discussion of *Ray v. Atlantic Richfield*, the United States District Court for the Northern District of Florida

opined that the pervasiveness of the Federal Home Loan Board's regulatory scheme did not result in "wholesale preemption". *First Federal Savings & Loan Ass'n of Gadsden County v. Peterson*, 516 F.Supp. 732, 737-738 (N.D.Fla. 1981), *rev'd for want of subject matter jurisdiction*, 707 F.2d 1217 (11th Cir. 1983). It nevertheless concluded that the Board's explicit authorization of "due-on-sale" clause preempted the application of a Florida state court ruling that such clauses were unenforceable.

At the heart of this growing discord among the federal courts is the question of the proper application of this Court's holding in *Ray v. Atlantic Richfield*. The supervisory powers of this Court over the federal judiciary are needed to silence these differences.

III. THE DECISION BELOW IS INCORRECT

The lower courts in this case gave insufficient deference to the cardinal principle for analyzing questions involving express preemption provisions. The court's task is simply to give effect to the intent of Congress. *Brown v. Hotel and Restaurant Employees and Bartenders*, 104 S.Ct. 3179 (1984) (O'Connor, J.).

In this case, the parties agreed that the Noise Control Act of 1972, 42 U.S.C. §4901 *et seq*., contained an express preemption provision in §4916(c). The plain language of that section imposes preemption only when an applicable federal regulation exists. This is evident from the opening clauses: ". . . after the effective date of a regulation under this section . . . , no State or political subdivision thereof may adopt. . . " Only an existing regulation can have an effective date. A withdrawn standard relating to noise from refrigerated trailers obviously does not exist.

In addition, Congress specified that the existing regulation must be of a certain type. It must be a "regulation . . . applicable to noise emissions from the operation of any equipment or facility of a surface carrier engaged in interstate commerce by railroad." 42 U.S.C. §4916(c). Congress also identified the state regulations which these existing federal regulations will preempt. "[N]o State or political subdivision thereof may adopt or enforce any

standard applicable to noise emissions resulting from the operation of the *same* equipment or facility. . ." *Id*. Literally this language contemplates preemption of only those state standards which regulate noise emissions covered by a federal standard.

Legislative history supports this reading. During the final consideration of the bill which became the Noise Control Act of 1972, Senator Tunney, the Senate floor manager of H.R. 11021, offered this interpretation: "I would stress, Mr. President, that the preemption provided in these sections only occurs in areas of regulation where adequate Federal regulations are in effect." 118 Cong.Rec. 37318 (1972), *reprinted in*, A Legislative History of the Noise Control Act of 1972 at 40 (1974).

In all candor, the EPA did advise the Third Circuit by memorandum that the agency had preempted Delaware's regulatory efforts by that agency's questionable withdrawal of promulgated standards. A-20. This is clearly an improper reading of §4916 and the comments of Senator Tunney. Rather than reconcile its opinion to the language of the statute, the EPA justified its position on the ground that it had withdrawn regulations which would have governed refrigerated trailers. Such self-justification transgresses the cardinal principle of preemption analysis: it impermissibly consigns the views of Congress to a subordinate role.

In this case, the State officials sought to regulate noise from stationary refrigerated trailers. The federal regulatory history demonstrates that a standard which would have governed such noise was withdrawn. Based on a plain reading of the statute and its supporting legislative history, it can not be said that Congress intended to preclude the State officials from this course. To the extent the lower courts concluded otherwise, they are mistaken.

CONCLUSION

For all of the foregoing reasons, the State officials respectfully ask this Court to summarily reverse or grant plenary consideration of the question presented by this appeal.

Dated: April 28, 1986

Charles M. Oberly, III
Attorney General of the
State of Delaware
Attorney for Appellant

Fred S. Silverman
State Solicitor

John J. Polk
Deputy Attorney General
Counsel of Record

(2)

85-1778

Supreme Court, U.S.
FILED
APR 28 1986
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

CHARLES M. OBERLY, III and JOHN E. WILSON, III,
Appellants,

v.

THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL.,
Appellees.

On Appeal from the United States Court
Of Appeals for the Third Circuit

APPENDIX TO JURISDICTIONAL STATEMENT

CHARLES M. OBERLY, III
Attorney General

FRED S. SILVERMAN
State Solicitor

JOHN J. POLK
Deputy Attorney General
Department of Justice
Carvel State Building
Wilmington, Delaware 19801

COUNSEL FOR APPELLANTS

9918

TABLE OF CONTENTS

Page

Opinion, *Baltimore & Ohio Railroad v. Oberly*, C.A. 84-452 WKS (D.Del. April 9, 1985) A-1

Order, *Baltimore & Ohio Railroad v. Oberly*, C.A. 84-452 WKS (D.Del. April 9, 1985) A-16

Opinion of the Court, *Baltimore & Ohio Railroad v. Oberly*, No. 85-5272 (3rd Cir. January 27, 1986) A-18

Judgment, *Baltimore & Ohio Railroad v. Oberly*, No. 85-5272 (3rd Cir. January 27, 1986) A-21

Notice of Appeal, *Baltimore & Ohio Railroad v. Oberly*, No. 85-5272 (3rd Cir. January 27, 1986) A-23

Transcript Excerpts of Oral Argument, *Baltimore & Ohio Railroad v. Oberly*, No. 85-5272 (3rd Cir. Nov. 18, 1985) A-24

Delaware Noise Control Act, 7 *Del. C.* §§7101 — 25 .... A-25

Regulations Governing The Control of Noise Pursuant To Provisions Of Part VII, 7 *Del. C.* c. 71, §7105 ..... A-39

Stipulated Factual Memorandum, *Baltimore & Ohio Railroad v. Oberly*, C.A. 84-452 WKS (D.Del. April 9, 1985) A-51

Status Report, *Association of American Railroads v. Costle*, No. 76-1353 (D.C.Cir. Nov. 12, 1981) A-77

Agreement to Dismiss, *Association of American Railroads v. Costle*, No. 76-1353 (D.C. Cir. Nov. 12, 1981) ... A-81

Affidavit of John E. Giles, *Baltimore & Ohio Railroad v. Oberly*, C.A. 84-452 WKS (D.Del. January 24, 1985) A-83

Affidavit of Charles W. Wilkins, III, *Baltimore & Ohio Railroad v. Oberly*, C.A. 84-452 WKS (D.Del. January 24, 1985) A-91

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

THE BALTIMORE AND OHIO RAILROAD COMPANY, a corporation of the State of Maryland, d/b/a One of the Chessie Systems Railroads, THE BALTIMORE AND PHILADELPHIA RAILROAD COMPANY, a corporation of the States of Pennsylvania and Delaware, d/b/a One of the Chessie Systems Railroads, MOUNT CLARE PROPERTIES (DELAWARE), INC., a corporation of the State of Maryland, and CHESSIE MOTOR EXPRESS, INC., a corporation of the State of Delaware,	:	Civil Action
Plaintiffs,	:	No. 84-452-WKS
v.	:	
CHARLES M. OBERLY, III, Attorney General of the State of Delaware, and JOHN E. WILSON, III, Secretary of the Department of Natural Resources and Environmental Control of the State of Delaware,	:	
Defendants.	:	

David S. Swayze, Esquire, William E. Manning, Esquire, James L. Holzman, Esquire, Wendie E. Cohen, Esquire, Prickett, Jones, Elliott, Kristol & Schnee, Wilmington, Delaware; Richard Keene, Esquire, John J. Higinbothom, Esquire, The Baltimore and Ohio Railroad Company, Baltimore, Maryland, Attorneys for Plaintiffs

John J. Polk, Esquire, Ellen R. Chaikin, Esquire, Deputy Attorneys General, Department of Justice, Wilmington, Delaware, Attorney for Defendants

OPINION

Wilmington, Delaware
April 9, 1985

STAPLETON, Chief Judge:

The plaintiffs in this case, Baltimore & Ohio Railroad Company ("B&O"), the Baltimore & Philadelphia Railroad Company, Mount Clare Properties (Delaware), Inc. and Chessie Motor Express (collectively "the Chessie Group"), bring this action for declaratory and injunctive relief against defendants Charles M. Oberly, III, in his capacity as the Attorney General of the State of Delaware, and John E. Wilson, III, in his capacity as the Secretary of the Department of Natural Resources and Environmental Control ("DNREC"). Plaintiffs seek to restrain the defendants from the threatened application and enforcement of the Delaware Noise Control Act, 7 Del. C., Chapter 71 (the "Delaware Act") and regulations thereunder on the grounds that the Delaware regulatory scheme is unconstitutional.

On August 14, 1984, defendant Wilson advised B&O's attorneys that the Delaware Department of Justice was preparing an action seeking injunctive relief at the Wilsmere Intermodal Facility (the "Wilsmere Facility" or "the Facility") for alleged violation of the Delaware Act. In response, the plaintiffs filed this action on August 17, 1984, and immediately thereafter moved for a temporary restraining order. A hearing on that motion was held on August 20, 1984, and the motion was granted.

The case is currently before the Court on plaintiffs' motion for a preliminary injunction. The plaintiffs' request for preliminary injunctive relief will be granted.

I. FACTS

The Facility is a railroad terminal located in New Castle County, Delaware. Plaintiffs B&O and its subsidiary B&P conduct joint railroad operations at the Facility. The property is coowned by B&P and Mount Clare Properties.

Over the past three decades, technological changes in the railroad industry have led to an increase in "intermodal" operations, which reflect a "marriage" between the railroad and trucking industries. Intermodal transportation is accomplished through the use of trailers or containers on flat cars which may be hauled by truck or rail ("TOFC" and "COFC" respectively). The Wilsmere Facility commenced intermodal operations in October 1982.

Perishable goods and produce from southern growing regions, destined for northeastern market distribution, constitute a great portion of the traffic at the Facility. These goods are transported by refrigerated trailer units which employ continuous action generators or compressors to maintain a constant temperature and prevent spoilage. These trailers perform the functions formerly performed exclusively by railroad refrigerated box cars.

At an August 1, 1984 meeting convened to discuss noise emissions from the Wilsmere Facility, representatives of the Air Quality Section of DNREC advised plaintiffs' attorneys that the equipment over which there was most regulatory concern was the refrigerated trailers. A representative of DNREC further advised plaintiffs' attorney, Mr. Manning, that a noise attenuation level of 29 decibels was necessary to comply with the Delaware regulations.

The plaintiffs in turn consulted an expert concerning the feasibility of complying with the 29 decibel attenuation requirement advised by DNREC. Based on their expert's analysis, plaintiffs concluded that they would be forced to discontinue or dramatically reduce intermodal operations at the Wilsmere Facility if forced to comply with the 29 decibel noise reduction requirement.

II.

The test for determining whether a preliminary injunction should issue was set forth by the Third Circuit in *Punnett v. Carter*, 621 F.2d 578, 582 (3d Cir. 1982):

> The moving party on a motion for a preliminary injunction must generally show (1) a reasonable probability of ultimate success on the merits of the litigation and (2) that the movant will be irreparably injured *pendente lite* if relief is not granted. In addition, the district court 'should take into account, when they are relevant (3) the possibility of harm to other interested persons from the grant or denial of the injunction and (4) the public interest.' [citations omitted].

The first inquiry, therefore, is whether the plaintiffs have shown a reasonable probability of success on the merits of their request for injunctive relief after a full hearing.

A. Success On The Merits

The plaintiffs argue that the Delaware Act is invalid and unenforceable on three grounds: (1) the Delaware Act is preempted by the Federal Noise Control Act of 1972 and regulations promulgated thereunder; (2) enforcement of the Delaware Act would impermissibly burden plaintiffs' operations in interstate commerce in violation of the Commerce Clause; and (3) both the Delaware Act and its regulations are void for vagueness under the Fourteenth Amendment.

Since I find that the plaintiffs have demonstrated a reasonable probability of ultimate success on the merits of their preemption argument, I need not consider the arguments based on the Commerce Clause and the Fourteenth Amendment.

Based on the language and legislative history of the Noise Control Act of 1972, 42 U.S.C. §4901, the defendants concede that Congress generally intended to preempt the regulation of noise created by interstate railroads. Defendants contend, however, that the federal government, by choosing not to prescribe noise standards for certain activities at railroad facilities, has left a "regulatory gap" that leaves those activities free of federal regulation and subject to state control.

With a few minor exceptions, the federal railroad noise standards apply to all rail cars and all locomotives. 40 C.F.R. §201.10. The standards purport to apply particularly to all active

retarders, all car coupling operations, all switcher locomotives, all load cell test stands, and

> . . . the total sound level emitted by rail cars and locomotives operated under the conditions specified, including the sound produced by refrigeration and air conditioning units which are an integral element of such equipment.

Id. The regulations set out sound level standards for applicable activities.

The defendants point out that, notwithstanding their stated applicability to refrigerator units on rail cars, the regulations propound no standard for these units. The defendants maintain that the federal government's failure to promulgate standards for these units leaves the operation of noise emitting, motionless refrigerated trailers and containers free of federal control.[1]

To more fully understand the defendants' argument respecting the so-called "regulatory gap," it is necessary to briefly review the history of the pertinent regulations promulgated pursuant to the Act. This review necessarily entails consideration of *Association of American Railroads v. Costle*, 562 F.2d 1310 (D.C. Cir. 1977).

In *Costle*, the plaintiff, Association of American Railroads, challenged the validity of the action of the Administrator of the EPA in promulgating under the Act railroad noise emission standards limited solely to rail cars and locomotives. Section 17 of the Act required the Administrator to establish emission standards for noise "resulting from operation of the equipment and facilities" of interstate rail carriers. 42 U.S.C. § 4916(1). The plaintiff in *Costle* argued that Section 17 required the Administrator to promulgate regulations for *all* of the "equipment and facilities" of interstate rail carriers. The EPA on the other hand argued that the Act vested the Administrator with discretion to determine

1. The pertinent regulations speak of rail cars equipped with refrigeration units. 40 C.F.R. § 201.10. The refrigerated trailers and containers at issue in the present case are not mentioned in the regulations. Defendants contend that the alleged regulatory gap created by the absence of standards for refrigerated rail cars also exists with respect to refrigerated trailers and containers, since the latter are the technological successors of the former.

which sources of railroad noise were to be regulated at the federal level. *Id*. at 1311.

The court of Appeals for the District of Columbia concluded that the EPA had misinterpreted the scope of the mandate of Section 17 of the Act through its "artificial and narrow" definition of "equipment and facilities." *Id*. at 1321. Indeed, the EPA had regulated only locomotives and rail cars, and had not regulated "facilities" at all. *Id*. at 1320. *Costle* concluded that the plain language of Section 17 of the Act did not permit the interpretation that Congress intended to vest discretion in the EPA to decide *which of the* equipment and facilities would be subject to regulation. *Id*. at 1315 (emphasis supplied by court). The court found that the reference to "equipment and facilities" was unambiguous and "subsumes *all* such equipment and facilities." *Id*.

The court in *Costle* did not, however, provide a definition for the phrase "equipment and facilities," but instead ordered the EPA to promulgate regulations in accordance with the meaning of "equipment and facilities" as that phrase is customarily used in the railroad industry. *Id*. at 1321.

On April 17, 1979, the EPA proposed regulations in response to the court's order in *Costle*. 44 Fed. Reg. 22960 (1979). In these proposed rules, the EPA suggested a specific standard limiting noise emissions for refrigerator cars. In addition, the EPA proposed property line standards to comply with *Costle*'s order requiring the regulation of noise emanating from railroad "facilities." In so doing, the EPA identified the significant noise sources that comprise the overall noise resulting from rail facilities. Among the noise sources identified were TOFC/COFC operations. 44 Fed. Reg. 22962.

However, neither the April 17, 1979 proposed specific standards for the noise generated by refrigerator cars, nor the proposed property line standards for noise emanating from facilities were ever adopted. The EPA promulgated the final standards for specific sources of railroad noise on January 4, 1980, and explicitly rejected promulgating a source standard for refrigerator cars at that time. 45 Fed. Reg. 1232, 1238 (1980). In the January 4, 1980 announcement, the EPA also stated its intention to defer

promulgation of final railyard property line standards pending further assessment of the extensive comments that it had received on those standards. *Id*. at 1256. In announcing that property line standards would be established at a future date, the EPA indicated that such property line regulations "will include the control of a wide variety of rail equipment and facilities associated with yard activity that is not specifically covered by the four source standards." *Id*.[2]

However, the property line standards were ultimately deemed unnecessary. The EPA withdrew further consideration of those standards. The Status Report of November 12, 1981, filed by the parties to the *Costle* litigation, stated the EPA's rationale for ultimately declining to adopt the proposed property line standards:

> Respondents believe that the cumulative effect of these standards [the final standards for specific sources of railroad noise, 45 Fed. Reg. 1252 (1980)], which were based on the noise abatement achievable through the application of the best available technology taking into consideration the cost of compliance, effectively regulate both railroad equipment and railroad facilities. The standards promulgated to date cover the major sources of noise from railroad equipment which in turn generate a large proportion of the noise emissions from rail facilities. Since the cumulative effect of regulating equipment used within railyards is also to regulate to a significant degree noise emissions from rail facilities, the parties agree that it is unnecessary for EPA to establish further property line facility emission standards specifically for railyards.
>
> In consideration of these facts, EPA intends to withdraw its proposal to promulgate a property line standard for rail facilities. Respondents agree with Petitioner AAR that EPA

2. On September 30, 1980, EPA published "Notice of availability of new data and advance notice of intent." In that Notice, EPA expressed its intent to consider specific noise standards for "parked cars with mechanical refrigeration units, and trailer on flat car container on flat car facilities [TOFC/COFC]." 45 Fed. Reg. 64876-77 (1980).

> has already effectively regulated railroad "equipment and facilities" in a manner "consistent with the customary usage of the phrase in the railroad industry," 562 F.2d at 1321, and in a manner consistent with the criteria contained in Section 17 of the Noise Control Act, and that national uniformity of treatment is effectively assured as the Federal standards become effective.[3]

In light of the foregoing history of the federal regulations controlling railroad noise, defendants "regulatory gap" argument must fail. It is clear that the EPA has expressly considered and rejected regulations of those noise sources that the State of Delaware seeks to control in the present case. Besides rejecting a proposed specific noise standard for refrigerator rail cars, the EPA also rejected proposed property line standards that were intended, in part, to regulate the noise generated by "TOFC/COFC" operations. The EPA concluded that the proposed property line standards were unnecessary, because the standards already controlling specific sources of railyard noise were deemed sufficient to control the noise emissions from rail facilities themselves.

The instant case is thus like those which recognize that a federal decision not to regulate has the same preemptive effect as a federal decision to regulate. As the Supreme Court has recognized on a number of occasions:

> [A] federal decision to forego regulation in a given area may imply an authoritative federal determination that the area is best left unregulated, and in that event would have as much pre-emptive force as a decision to regulate.

Arkansas Elec. Co-Op. Corp. v. Arkansas Public Commission, 103 S.Ct. 1905, 1912 (1983); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 178 (1977).

---

3. On December 1, 1982, EPA published a formal "Withdrawal of proposed standards," in which it announced its determination to reject the proposed property line standards in accordance with the decision by the parties to the *Costle* litigation. 47 Fed. Reg. 54107-54108 (1982).

In support of its argument that the lack of a federal *noise* standard pertaining to refrigerated rail cars invites supplementary state regulation, the defendants point to the language of the preemption clause of the Act. In pertinent part the preemptive language of the Act recites:

> . . . after the effective date of a regulation under this section applicable to noise emissions resulting from the operation of any equipment or facility of a surface carrier engaged in interstate commerce by railroad, no State or political subdivision thereof may adopt or enforce any standard applicable to noise emissions resulting from the operation of the same equipment or facility of such carrier unless such standard is identical to a standard applicable to noise emissions resulting from such operation prescribed by any regulation under this section.

42 U.S.C. § 4916(c)(1). Defendants argue that, when read literally, the statute preempts state regulation of noise from the operation of equipment or facilities *only* where the noise is covered by a federal regulation. I cannot agree with the defendants' reading of the preemption clause, particularly where as here, the EPA expressly considered and rejected standards for those noise sources that the State of Delaware is now seeking to control. Adopting the construction of the preemption clause advocated by defendants would permit states to regulate railyard equipment and facilities whenever the federal government made the conscious decision that further regulation was unnecessary. Such a result would be at odds with the Act's express purpose to establish nationally uniform standards in the control of railroad and other major sources of noise. 42 U.S.C. § 4901(a)(3).

The defendants also argue that the EPA itself has acknowledged the existence of a federal regulatory gap in its standards relating to railyard noise into which the states may inject their own regulations. Defendants argue that the April 17, 1979 EPA proposal establishing a sound level standard for refrigerator car noise and a property line standard (which took into account the noise generated by TOFC/COFC operations) shows that the EPA did not read its existing regulations to apply to these noise

sources. While the defendants' argument may be correct insofar as it goes, it misses the most salient aspect of the history of the proposed standards relating to refrigerator car noise and property line standards, namely that the EPA rejected final promulgation of these standards because they were deemed *unnecessary*.

B. Irreparable Harm

The moving party on a motion for a preliminary injunction bears the burden of demonstrating an imminent threat of irreparable harm. *Punnett v. Carter*, 621 F.2d at 586. I conclude that the plaintiffs have net that burden in the present case.

On August 1, 1984, plaintiffs' attorneys met with representatives of DNREC to discuss noise emissions from the Wilsmere facility. At this meeting, the plaintiffs were informed by DNREC that the refrigerated trailers were the noise source of greatest regulatory concern. Charles Wilkins, a DNREC representative, also informed plaintiffs that a noise attenuation of 29 decibels was necessary to comply with Delaware regulations. Two weeks later, plaintiffs were informed by DNREC that on or about August 20, 1984, the State of Delaware would initiate an action seeking to enforce its Noise Control Act against plaintiffs' operations at the Wilsmere Facility. Plaintiffs were also informed at that time that the State's enforcement action would include a request for immediate injunctive relief.[4]

In order to determine the expense and difficulty of achieving the 29 decibel noise reduction required by the State, plaintiffs consulted Grant Anderson, a physicist and acoustical engineer who specializes in railroad and highway transportation noise and its mitigation. Anderson Aff. ¶3. Anderson concluded that a 29 decibel noise reduction could be obtained by: (1) employing yet to be designed enclosures that would envelope refrigeration units — a reduction of 7 dbA; (2) constructing a 20 foot high sound barrier along plaintiffs' northern property line — a reduction of 6 dbA; and (3) moving the trailers with refrigeration units to a location 600 feet from the spot at which the DNREC's

4. Affidavit of William Manning.

measurements were taken — the remaining 16 dbA reduction. Anderson Aff. ¶45.

This three phase compliance program was in turn reviewed by John Giles, the general manager for TOFC/COFC operations for plaintiff B&O. Giles Aff. ¶¶1, 28. Giles concluded that the Wilsmere facility would be forced to shut down completely if such compliance were required. Moreover, in the event of a shutdown, the B&O intermodal facilities in Philadelphia and Baltimore would not be available as feasible alternatives. The Philadelphia facility is physically incapable of absorbing the additional traffic; and, use of the Baltimore facility would entail the non-competitive additional costs of drayage to and from northeastern markets in and out of Baltimore. Giles Aff. at ¶25.

As to the obstacles preventing implementation of Anderson's three phase compliance program, Giles attested that the Wilsmere facility simply does not have the space necessary to permit removal of the refrigeration units to a location 600 feet from neighboring properties. *Id.* at ¶29. If forced to comply with the 600 foot relocation requirement, the facility would only have enough space to accommodate 40 refrigeration trailers. *Id.* at ¶29(A). While the daily average number of refrigeration units at the facility is thirty-three, *id.* at ¶18, during peak periods, the number of refrigeration units grows to one hundred twenty. *Id.* at ¶29(C).

In addition, the costs of the twenty foot sound barrier ($1.2 million), the costs of the enclosures that would envelop the refrigeration units, as well as the costs attributable to the increased labor and machinery that would be necessary to mount and remove the enclosures would price the Wilsmere Facility "out of the competition." *Id.* at ¶29(B).

Giles' contentions concerning the impact that a 29 decibel noise reduction requirement would have upon plaintiffs' operations at the Wilsmere Facility stand largely uncontradicted on the present record.

The defendants nonetheless raise several arguments. First, defendants contend that the plaintiffs cannot base their claim of irreparable harm on the ground that they would be forced to

reduce noise emissions at the Facility by 29 decibels. Defendants claim that the 29 decibel figure was not the basis of the contemplated state enforcement action.

The plaintiffs were informed by a representative of DNREC that compliance with the Delaware Act required noise abatement of 29 decibels; two weeks later, the plaintiffs were informed that the State of Delaware would shortly initiate an action under the Delaware Act against plaintiffs' operations at the Wilsmere Facility. There is no suggestion in the present record that defendants ever informed the plaintiffs that some calculation, other than the 29 decibel limitation, would form the basis of the threatened action. Under these circumstances, the plaintiffs are justified in basing their argument of irreparable harm upon the 29 decibel attenuation requirement.

The defendants further argue that the only harm facing the plaintiffs is the cost of litigating the threatened state enforcement action and that the costs of such litigation, as a matter of law, do not constitute irreparable harm. In addition, relying upon *A.O. Smith Corp. v. FTC*, 530 F.2d 515 (3d Cir. 1976), and this Court's decision in *Pharmaceutical Manufacturers Ass'n v.FDA*, No. 77-291, Slip Op. (D. Del. October 5, 1977), the defendants contend that, even if the losses facing the plaintiffs go beyond the mere costs associated with litigation, those costs amount to no more than loss of profits resulting from the costs of complying with a governmental regulation, and cannot, therefore, constitute irreparable harm.

Clearly, however, the plaintiffs have established that they face injury considerably greater than that associated with the mere costs of litigation.[5] I also conclude that the plaintiffs are

5. Defendants argue that the only immediate threat of irreparable injury which plaintiffs have shown is the threat of having to pay the legal expenses necessary to defend a state enforcement action. Implicit in this argument is the assumption that plaintiffs have available to them the option of continuing to do business as usual during the pendency of the threatened state court enforcement proceedings and that the only detriment to plaintiffs during this period will be the cost of their defense. This contention overlooks two things. First, the Delaware Regulations are self-enforcing in the sense that any violation of them is subject to a fine, with each day of noncompliance constituting a separate offense. "Willful" or "negligent" violations expose the violator to a fine of

threatened with harm that is greater than the mere loss of profits if preliminary relief does not issue.

Giles averred that the Wilsmere facility faces "numerous" direct and indirect area competitors in the transportation business. Giles Aff. ¶¶23-26. As previously noted, he also stated that the costs of compliance with Anderson's noise reduction plan would "price the facility out of the competition." Moreover, it would appear from Giles' assertions that, during "peak periods", the facility would no longer be able to accommodate a significant portion of its refrigeration trailer traffic. Giles asserted that the daily peak number of refrigerated trailers at the Facility was 120, but that the 600 foot relocation requirement would limit the Facility to a capacity of 40 such trailers.

The defendants have not seriously challenged Giles' assertions concerning the nature of the harm that would befall the Facility in the event compliance with the threatened 29 decibel noise reduction was required. I view this harm as considerably more serious than the mere loss of profits attendant upon compliance with a government regulation. *See Northern Natural Gas v. United States Dept. of Energy*, 464 F. Supp. 1145, 1158 (D. Del. 1979) (where this Court interpreted *A.O. Smith v. F.T.C.* as permitting a finding that lost profits can constitute irreparable harm if they are "peculiar", that is, if the lost profits constitute a loss greater than the "normal cost of doing business in today's world of government regulation.") The plaintiffs here face not only loss of revenue, but they stand to lose their competitive position in the northeastern region of the country, if, as Giles asserts, compliance with the threatened action would require increased rates for customers, as well as reduction in refrigerator trailer operations at the Facility.

---

up to $3,000 per day. Second, the undisputed Manning affidavit indicates that when plaintiffs' counsel were advised by DNREC that it was about to initiate an enforcement action, they were also advised that immediate injunctive relief would be sought. The threat of coercive enforcement was thus real and imminent when this action was commenced. Plaintiffs sought protection from that threat in this Court, as it is conceded they had a right to do.

C. The Public Interest

In determining whether a preliminary injunction will issue, a court should, where relevant, consider the potential harm that a grant or denial of preliminary relief will have on the public interest and other interested parties. *Punnett v. Carter*, 621 F.2d at 582.

The defendants assert that the public interest favors the State's enforcement of its noise regulations. In support of their position, the defendants have submitted a number of affidavits by homeowners living near the Facility who complain that the noise from the Facility has adversely affected their lives in a variety of ways.

While these complaints of noise-related stress are not to be taken lightly, there is a competing and equally important public interest in the present case that favors issuance of preliminary injunctive relief.

In the Noise Control Act, Congress expressed the need for "national uniformity of treatment" in regulating major sources of noise. 42 U.S.C. §4901(a)(3). With respect to the control of railroad noise, Congress has attempted to ensure such uniformity by including a direct and express preemption clause in the statute. 42 U.S.C. §4916(c)(1). Implicit in this concern with national uniformity is Congress' perception that the public interest is best served by uniform noise regulations throughout the nation. In the absence of uniform regulations, carriers would be subject to a variety of differing state and local regulations, resulting in confusion and undue burdens upon the orderly flow of goods between the states. The disruption and alteration in operations that will occur at the Wilsmere Facility in the absence of preliminary relief is precisely the type of situation that Congress has determined is contrary to the public interest.

Based on the current record, I am unable to conclude that the harms suffered by the homeowners surrounding the Facility significantly outweigh the harm to the public interest that would result if the Facility and the interstate carriers using it were

forced to adjust their operations to the requirements of the Delaware Act.[6]

Defendants' final argument is that plaintiffs have abused their privileges under the Temporary Restraining Order, and therefore are not entitled to a preliminary injunction. Specifically, defendants claim that plaintiffs expanded their operation at the Wilsmere Facility after the Temporary Restraining Order went into effect.

"[T]he proper standard to determine the status quo is the last uncontested status which precedes the pending controversy." *American Can Co. v. Local U. 7420, United Steelworkers of America*, 350 F. Supp. 810, 812 (E.D. Pa. 1972) (citing *Warner Bros. Pictures, Inc. v. Gittone*, 110 F.2d 292, 293 (3d Cir. 1940)). Based on the current record, defendants have failed to persuade me that the plaintiffs' conduct, while the TRO was in effect, was different from their conduct prior to the present dispute. While the plaintiffs may have expanded their operations, there is no evidence that their intention to do so prior to this controversy was not well known to defendants. More importantly, it would appear from defendants' own contentions that the physical expansion at the Wilsmere Facility of which they complain had begun prior to the defendants' threatened enforcement of the Delaware Act. *See* Defendants' Brief at 6.

For the foregoing reasons, plaintiffs' request for a preliminary injunction will be granted.

---

6. In this regard, it should be noted that the Noise Control Act permits states to enforce regulations directed at railroad noise "if the Administrator, after consultation with the Secretary of Transportation, determines that such standard . . . is necessitated by special local conditions and is not in conflict with regulations promulgated under this section." 42 U.S.C. §4916(c) (2) The defendants in the present case have not sought the EPA's permission to enforce their local noise regulations.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

THE BALTIMORE AND OHIO RAILROAD COMPANY, a corporation of the State of Maryland, d/b/a One of the Chessie Systems Railroads, THE BALTIMORE AND PHILADELPHIA RAILROAD COMPANY, a corporation of the States of Pennsylvania and Delaware, d/b/a One of the Chessie Systems Railroads, MOUNT CLARE PROPERTIES (DELAWARE), INC., a corporation of the State of Maryland, and CHESSIE MOTOR EXPRESS, INC., a corporation of the State of Delaware,	:	Civil Action
Plaintiffs,	:	No. 84-452-WKS
v.	:	
CHARLES M. OBERLY, III, Attorney General of the State of Delaware, and JOHN E. WILSON, III, Secretary of the Department of Natural Resources and Environmental Control of the State of Delaware,	:	
Defendants.	:	

PRELIMINARY INJUNCTION

THIS 9th day of April, 1985, for the reasons set forth in the Court's Opinion filed this date,

IT IS ORDERED that the defendants, Charles M. Oberly, III, Attorney General of the State of Delaware, and John E. Wilson, III, Secretary of the Department of Natural Resources and Environmental Control of the State of Delaware, their officers, agents, employees, successors, attorneys and all those

acting in concert or participation with them, are hereby preliminarily enjoined from the application, enforcement, and prosecution of the Delaware Noise Control Act, 7 Del. C. Chapter 71 and regulations thereunder, against plaintiffs until the final resolution of this lawsuit.

_____

United States District Judge

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-5272

THE BALTIMORE AND OHIO RAILROAD COMPANY, d/b/a One of the Chessie System Railroads; THE BALTIMORE AND PHILADELPHIA RAILROAD COMPANY, d/b/a One of the Chessie System Railroads, MOUNT CLARE PROPERTIES (DELAWARE), INC., and CHESSIE MOTOR EXPRESS, INC.

—

v.

CHARLES M. OBERLY, III, Attorney General of the State of Delaware, and JOHN E. WILSON, III, Secretary of the Department of Natural Resources and Environmental Control of the State of Delaware

Charles M. Oberly, II and
John E. Wilson, III,

Appellants

On Appeal from the United States District Court for the District of Delaware
(D.C. Civil No. 84-0452)

Argued November 18, 1985
Before: HIGGINBOTHAM, SLOVITER and MANSMANN, *Circuit Judges*.

(Filed January 27, 1986)

WILLIAM E. MANNING, ESQ. (Argued)
DAVID S. SWAYZE, ESQ.
PRICKETT, JONES, ELLIOTT, KRISTOL & SCHNEE
P.O. Box 1328
Wilmington, DE 19899
Attorneys for Appellees

F. HENRY HABICHT, II, ESQ.
Assistant Attorney General
Land and Natural Resources Division
LAWRENCE R. LIEBESMAN, ESQ.
Environmental Defense Section
Land and Natural Resources Division
U.S. Department of Justice
P.O. Box 23986
Washington, D.C. 20026-3986
Attorneys for EPA

JOHN J. POLK, Esq. (Argued)
Deputy Attorney General
Department of Justice
State Office Building
820 N. French Street
Wilmington, DE 19801
Attorney for State of Delaware

OPINION OF THE COURT

PER CURIAM:

In this appeal, we are presented with the question of whether the Delaware noise control statute and its regulations, as applied to activities at an interstate railroad facility, are pre-empted by the Federal Noise Control Act of 1972, even though the federal agency had not promulgated regulations to control noise emissions from railyard property lines, which included refrigerated rail cars and refrigerated trailers and containers (trailer on flat car/containers on flat car—TOFC/COFC). 7 Del. C. §7101 *et. seq.*: Noise Control Act of 1972, § 17, 42 U.S.C. § 4916.

We hold that the application of the Delaware noise control statute to the interstate railroad facility in issue is preempted by the federal noise control statute for the reasons noted in Judge Stapleton's opinion. *Baltimore and Ohio R. Co. v. Oberly*, 606 F. Supp. 1340 (D. Del. 1985). In addition, we note that, at our request, the General Counsel of the United States Environmental Protection Agency ("EPA") filed a memorandum of law addressing the EPA's views as to whether the Delaware statute is preempted. The EPA also agreed that section 17 of the Noise Control Act preempts the Delaware standard where EPA has adopted federal standards regulating noise from railroad facilities and, further, has considered and then declined to prescribe a federal property line standard for railroad facilities on the ground that it is unnecessary.

Accordingly, the judgment of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-5272

THE BALTIMORE AND OHIO RAILROAD COMPANY, d/b/a One of the Chessie System Railroads; THE BALTIMORE AND PHILADELPHIA RAILROAD COMPANY, d/b/a One of the Chessie System Railroads, MOUNT CLARE PROPERTIES (DELAWARE), INC; and CHESSIE MOTOR EXPRESS, INC.

v.

CHARLES M. OBERLY, III, Attorney General of the State of Delaware and JOHN E. WILSON, III, Secretary of the Department of Natural Resources and Environmental Control of the State of Delaware

Charles M. Oberly, III and John E. Wilson, III,
Appellants

On Appeal from the United States District Court
for the District of Delaware
(D.C. Civil No. 84-0452)

Present: HIGGINBOTHAM, SLOVITER and MANSMANN,
Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of Delaware and was argued by counsel November 18, 1985.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered April 9, 1985, be, and the same is hereby affirmed. Costs taxed against the appellants.

ATTEST:

Clerk

January 27, 1986

Certified as a true copy and issued in lieu of a formal mandate on
February 18, 1986.

Test:

Chief Deputy Clerk, United States Court of Appeals, for the
Third Circuit.

RECEIVED
APR 11 1986
U.S.C.A. 3.

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

THE BALTIMORE AND OHIO RAILROAD COMPANY, et al., *Appellees,*	:	
v.	:	No. 85-5272
CHARLES M. OBERLY, III and JOHN E. WILSON, III *Appellants.*	:	

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

PLEASE TAKE NOTICE that Charles M. Oberly, III and John E. Wilson, III, appellants in this matter, hereby appeal to the Supreme Court of the United States from the order, entered in this matter on January 27, 1986, affirming the imposition of a preliminary injunction by the United States District Court for the District of Delaware.

This appeal is taken pursuant to 28 U.S.C. §1254(2).

DEPARTMENT OF JUSTICE

STATE OF DELAWARE

BY: _____

JOHN J. POLK
Deputy Attorney General
Department of Justice
State Office Building
820 N. French Street
Wilmington, DE 19801
302-571-2467
Attorney for Appellants

Date: April 8, 1986

MR. POLK: I can't foresee any additional evidence, Your Honor, that would overcome the finding of the District Court that Delaware's laws — Delaware's regulations were preempted by the federal standard.

THE COURT: Did the parties stipulate that the record on the preliminary injunction would be the same as on final injunction, which we have seen on many cases?

MR. POLK: There was no specific stipulation as to that matter, Your Honor.

THE COURT: Would you be willing to stipulate to that now?

MR. POLK: Yes, Your Honor.

THE COURT: That we may look upon this case at our option as if it was really a hearing on final injunction?

MR. POLK: Yes, Your Honor.

THE COURT: Go ahead.

MR. POLK: Thank you. The one significant matter of fact that I want to bring to the Court's attention is the nature of the intermodal operation that occurs at Wilmington. Trailers are brought in on flat cars.

* * *

THE COURT: Okay.

THE COURT: Counsel on both sides, obviously, you knowthere is a different standard under which we review a case on appeal for a preliminary injunction than we review a case from a final injunction. It's my understanding from the argument which each side has made that you are willing for us to consider this case on the standards which one would evaluate a final injunction rather than a preliminary injunction because you would not contemplate putting on any further evidence. Are we correct in this understanding?

MR. MANNING: From our perspective, yes, Your Honor. We are quite happy to have the Court proceed on that basis.

MR. POLK: (inaudible) also, Your Honor.

Your Honor, I simply wish to address the EPA's position and the position adopted by the appellees that the cumulative effect of the EPA's regulation of the noise from the—from the individual items in the facility regulates the noise

* * *

CHAPTER 71. NOISE CONTROL AND ABATEMENT

Subchapter I. Nonvehicle Provisions

Sec.

7101. Declaration of purpose.
7102. Short title.
7103. Definitions.
7104. Noise and noise disturbance prohibited.
7105. Administration of chapter; applicability of subchapter.
7106. Powers and duties of Department of Natural Resources and Environmental Control.
7107. Authority of Department of Natural Resources and Environmental Control.
7108. Enforcement: investigations: injunctive relief.
7109. Variance.
7110. Temporary emergency variance.
7111. Testimony at hearings.
7112. Conduct of hearings.
7113. Appeals of final orders.

Subchapter II. Motor Vehicles

7120. Powers and duties of Department of Public Safety.
7121. Motor vehicle noise inspection.
7122. Motor vehicle violations; enforcement.
7123. Liberal interpretation.
7124. Other ordinances or remedies.
7125. Exemptions.

Subchapter I. Nonvehicle Provisions

§ 7101. Declaration of purpose.

(a) The General Assembly finds and determines that the people of this State are entitled to and should be ensured an environment free from noise which unnecessarily degrades the quality of their life; that the levels of noise often reach such a degree as to endanger the health, safety and welfare, jeopardize the value of property and erode the integrity of the environment of the people of this State.

(b) The General Assembly also finds that a substantial body of science and technology exists by which noise may be substantially abated; and that the dangers of excessive noise can be abated by the adoption and enforcement of noise standards embodied in regulations based upon these scientific and technological findings.

(c) The General Assembly also finds that the problem of combating noise involves a high degree of cooperation on the part of various state agencies and departments; this chapter makes specific provisions for such inter-agency cooperation. (60 Del. Laws, c. 648, § 1; 63 Del. Laws, c. 369, §1.)

§ 7102. Short title.

This chapter shall be known and may be cited as the Delaware Noise Control Act. (60 Del. Laws, c. 648, § 1; 63 Del. Laws, c. 369, § 1.)

§ 7103. Definitions.

(a) "Committee" shall mean the Noise Advisory Committee created under this chapter.

(b) "Farming operations" shall mean any activity which is involved in the production of agriculture, livestock, dairy or poultry products for sale.

(c) "Farm vehicle" shall mean a wheeled device used for transportation in farming operations.

(d) "Manufacturer" shall mean any person employing 5 or more employees and who is licensed as a manufacturer by the Department of Finance in accordance with Chapter 27 of Title 30.

(e) "Motor vehicle" shall mean any vehicle defined as a motor vehicle in accordance with § 101 of Title 21.

(f) "Noise" shall mean any sound which annoys or disturbs humans or which causes or tends to cause an adverse psychological or physiological effect on humans, excluding all aspects of noise regulated by the federal Occupational Safety and Health Act (OSHA).

(g) "Noise disturbance" means any sound which:

(1) Endangers or injures the safety or health of humans or animals; or

(2) Annoys or disturbs a reasonable person of normal sensitivities; or

(3) Jeopardizes the value of property and erodes the integrity of the environment.

(h) "Person" shall mean any corporation, company, association, society, firm, partnership and any joint stock company, as well as individuals, and shall also include the State and all of its political subdivisions, agencies and instrumentalities as well as any department, board or agency of the government of the United States.

(i) "Secretary" shall mean the Secretary of the Department of Natural Resources and Environmental Control. (60 Del. Laws, c. 648, §1; 63 Del. Laws, c. 369, § 1.)

§ 7104. Noise and noise disturbance prohibited.

(a) No person shall, without first having obtained a variance or a temporary emergency variance from the Department of Natural Resources and Environmental Control, undertake any activity which in any way may cause or contribute to the creation of noise or a noise disturbance.

(b) No person shall, without having first obtained a variance or a temporary emergency variance from the Department of Natural Resources and Environmental Control, construct, install, replace, modify or use any equipment, machinery, motor vehicle, device or other article which in any way may cause or contribute to the creation of noise or a noise disturbance. (60 Del. Laws, c. 648, §1; 63 Del. Laws, c. 369, §1).

§ 7105. Administration of chapter; applicability of subchapter.

(a) The Secretary of the Department of Natural Resources and Environmental Control or his duly authorized designee shall exercise general supervision over the administration of this chapter and, in conjunction with the various law-enforcement agencies of this State, the enforcement of this chapter, and shall have jurisdiction over noise emanating from motor vehicles to the extent of approving standards, codes and regulations proposed by the Secretary of the Department of Public Safety.

(b) The Secretary of the Department of Public Safety shall exercise general supervision over the administration and enforcement of this chapter with regard to noise emanating from motor vehicles.

(c) This subchapter shall not apply to noise caused or created by the work of any public service company incident to the repair or maintenance of its equipment or facilities which may have been damaged or destroyed as the result of any emergency situation including but not limited to acts of God, accidents and explosions. (60 Del. Laws, c. 648, §1; 63 Del. Laws, c. 369, §1.)

§ 7106. Powers and duties of Department of Natural Resources and Environmental Control.

The Department of Natural Resources and Environmental Control shall have the power and its duty shall be to:

(1) Adopt standards, rules and regulations, after public hearing, for the prevention, control, reduction and abatement of noise pollution, applicable throughout the State or to such parts or regions thereof specifically designated in such regulations. The procedure for public hearings shall conform to the procedure described in subdivision (2) of § 6006 of this title; such rules and regulations, however, shall not purport to exercise jurisdiction over any person or activity not included or affected by this subchapter;

(2) Cooperate with all other state departments, divisions and agencies in the formulation and preparation of rules and regulations for the control of noise;

(3) Enter into agreements with any other state department in order to effectuate this chapter;

(4) Enforce this chapter, and all regulations, codes and rules, promulgated pursuant thereto, except those provisions of this chapter pertaining to motor vehicles;

(5) In conjunction with the various law-enforcement agencies of this State, receive or initiate complaints of noise and institute legal proceedings for the prevention of noise and for the recovery of penalties, in accordance with this chapter.

(6) Keep records of violations cited, enforcement procedures initiated and completed in accordance with this section. (60 Del. Laws, c. 648, §1; 63 Del. Laws, c. 369, §1.)

§ 7107. Authority of Department of Natural Resources and Environmental Control.

The Department of Natural Resources and Environmental Control shall have the authority to:

(1) Conduct and supervise research programs for the purpose of determining the causes, effects and hazards of noise;

(2) Conduct and supervise statewide programs of noise control education, including the preparation and distribution of information relating to noise control;

(3) Enter and inspect any building or place, except private residences, for the purpose of investigating an actual or suspected source of noise and ascertaining compliance or noncompliance of any statute, rule or regulation of Department. Any information relating to secret processes or methods of manufacture or production obtained in the course of such inspection, investigation or determination shall be kept confidential and shall not be admissible in evidence in any court or in any other proceedings except to the extent herein provided. If tests of any type are made for the purpose of determining whether or not a violation has occurred, or for any other purpose in connection with such entry and inspection, a duplicate of the results of the tests shall be furnished promptly to the person suspected of violating the statute, code or regulation;

(4) With the approval of the Governor, cooperate with and receive money from the federal government, the state government or any county or municipal government or from private sources for the study and control of noise; and

(5) Review and approve any plan to construct any highway corridor, the construction or operation of which may in the opinion of the Department cause or contribute to an amount of noise deemed excessive by the Department. (63 Del. Laws, c. 369, § 1.)

§ 7108. Enforcement; investigations; injunctive relief.

(a) The Department of Natural Resources and Environmental Control shall enforce this chapter and any duly promulgated rules and regulations. All law-enforcement agencies of this State,

including but not limited to police forces of the counties and incorporated cities and towns, may also enforce this chapter and any duly promulgated rules and regulations.

(b) Whenever the Department of Natural Resources and Environmental Control or any law-enforcement agency within this State has cause to believe based upon observation or a complaint that any person is violating this chapter, or any rules or regulations promulgated in accordance with this chapter, the Department or law-enforcement agency is authorized to conduct an investigation in connection therewith.

(c) If upon investigation the Department of Natural Resources and Environmental Control or any law-enforcement officer of this State discovers a condition which is in violation of any provision of this chapter or any rule or regulation promulgated pursuant thereto, the Department or law-enforcement officer shall be authorized to order such violation to cease and may take such reasonable steps as are necessary to enforce such an order. The order shall state why a violation exists and shall provide a reasonably specified time within which the violation must cease.

(d) The person responsible for the violation shall make the corrections necessary to comply with the requirements of this chapter or any rule or regulation promulgated pursuant thereto within the time specified in the order.

(e) Nothing herein shall be deemed to prevent the Department of Natural Resources and Environmental Control or any other law-enforcement agency of this State from prosecuting any violation of this chapter or any rule or regulation promulgated pursuant thereto, notwithstanding that such violation is corrected in accordance with the above order.

(f) In his discretion, the Secretary of the Department of Natural Resources and Environmental Control may endeavor by conciliation to obtain compliance with all requirements of this chapter or any rule or regulation promulgated pursuant thereto. Conciliation shall be attempted by giving written notice to the responsible party which:

(1) Specifies the violation;

(2) Proposes a reasonable time for its correction; and

(3) Advises that a cease and desist order may be issued or other action taken unless the violation is corrected.

(g) If a violation is threatening to begin, or is continuing, or if there is a substantial likelihood that it will reoccur, or if the Department of Natural Resources and Environmental Control receives information that a noise disturbance presents an imminent or substantial hazard to public health or to the environment, the Secretary of the Department of Natural Resources and Environmental Control may, in addition to or in lieu of any other remedy provided for in this chapter, seek a temporary restraining order or a preliminary or permanent injunction in the Court of Chancery.

(h) Whoever violates this chapter or any rule or regulation duly promulgated thereunder, or any variance or temporary emergency variance issued pursuant to this section or § 7109 of this title or any cease and desist order of the Secretary, shall be punished by a fine of not less than $25 nor more than $500 for each violation. Each day of violation shall be considered as a separate violation. Any court of competent jurisdiction shall have jurisdiction of offenses under this subsection.

(i) Any person who willfully or negligently violates this chapter or any rule or regulation duly promulgated thereunder, or any variance or temporary emergency variance or any cease and desist order of the Secretary shall be punished by a penalty of not less than $500 nor more than $3,000 for each day of such violation. The Superior Court shall have jurisdiction of offenses under this subsection.

(j) It shall be a misdemeanor for any person to obstruct, hinder, delay or interfere with, by force or otherwise, the performance by personnel of the Department of Natural Resources and Environmental Control or any other enforcement personnel of any duty under this chapter, or any rule or regulation or order or permit or decision promulgated or issued thereunder. (60 Del. Laws, c. 648, § 1; 63 Del. Laws, c. 369, § 1.)

§ 7109. Variance.

(a) Any person who owns or operates any stationary noise source may apply to the Secretary of the Department of Natural Resources and Environmental Control for a variance or a partial variance from 1 or more of the rules or regulations promulgated pursuant to this chapter. Applicants for a variance shall supply information including, but not limited to:

(1) Information on the nature and location of the facility or process for which such application is made.

(2) The reason for which the variance is required, including the economic and technical justifications.

(3) The nature and intensity of noise that will occur during the period of the variance.

(4) A description of interim noise control measures to be taken by the applicant to minimize noise and the impacts occurring therefrom.

(5) A specific schedule of the best practical noise control measures, if any, which might be taken to bring the source into compliance with those regulations from which a variance is sought, and a statement of the length of time during which it is estimated that it will be necessary for the variance to continue.

(6) Any other relevant information the Department may require in order to make a determination regarding the application.

(b) Failure to supply the information required shall be cause for rejection of the application unless the applicant supplies the needed information within 30 days of the written request by the Department for such information.

(c) No variance shall be approved unless the Secretary finds that:

(1) Noise levels occurring during the period of the variance will not constitute a danger to the public health; and

(2) Compliance with this chapter and any duly promulgated rules or regulations would impose an arbitrary or unreasonable hardship upon the applicant without a commensurate benefit to the public.

(d) In determining whether to grant a variance, the Secretary shall consider:

(1) The character and degree of injury to, or interference with, the health and welfare of people or the reasonable use of property which is caused or threatened to be caused by the noise during the variance period.

(2) The social and economic value of the activity for which the variance is sought.

(3) The ability of the applicant to apply best practical noise control measures, as defined in duly promulgated regulations.

(e) Following receipt and review of an application for a variance, and after publishing notice once a week for 2 weeks in a newspaper of general circulation in the county wherein the variance is proposed, the Department shall, if necessary, fix a date, time and location for a hearing on such application in accordance with § 6004 of this title. Costs of newspaper advertising are to be paid by the applicant.

(f) Within 10 days of the receipt of the record of a hearing on a variance application, or within 10 days of receipt of an application on which no hearing is held, the Department shall issue its determination regarding such application and provide a copy to affected parties. All such decisions shall briefly set forth the reasons for the decision.

(g) The Department may, in its discretion, limit the duration of any variance granted. Any person holding a variance and needing an extension of time may apply for a new variance under this chapter and any duly promulgated rules and regulations for a period not to exceed 1 year. Any such application shall include a certification of compliance with any condition imposed under the previous variance.

(h) The Department may attach to any variance any reasonable conditions it deems necessary and desirable, including, but not limited to:

(1) Requirements for the best practical noise control measures to be taken by the owner or operator of the source to minimize noise during the period of the variance.

(2) Requirements for periodic reports submitted by the applicant relating to noise, to compliance with any other conditions under which the variance was granted or to any other information the Department deems necessary.

(i) A variance may include a compliance schedule and requirements for periodic reporting of increments of achievement of compliance. (63 Del. Laws, c. 369, § 1.)

§ 7110. Temporary emergency variance.

(a) A temporary emergency variance may be granted by the Department:

(1) If a severe hardship would be caused by the time period involved in obtaining a full variance.

(2) If the emergency is of an unforeseen nature so as to preclude a full variance because of time limitations.

(3) If all conditions comply with those required for a full variance.

(4) For a period not to exceed 60 days, not to be extended more than once.

(b) The granting of any temporary emergency variance shall be published within 5 days of the granting in a newspaper of general circulation once a week for 2 weeks in the county where the applicant resides. (63 Del. Laws, c. 369, § 1.)

§ 7111. Testimony at hearings.

Testimony taken at any hearing shall be under oath and recorded stenographically, but the parties shall not be bound by

the strict rules of evidence prevailing in the courts of law and equity. True copies of any transcript and of any other record made of or at such hearings shall be furnished to any party thereto upon request, and at his expense. Applicants shall pay for any and all stenographer's fees and, if requested, copies of the transcript. (60 Del. Laws, c. 648, § 1; 63 Del. Laws, c. 369, § 1.

§7112. Conduct of hearings.

Any administrative or nonjudicial hearings required by this chapter shall be held before the Secretary of the Department of Natural Resources and Environmental Control or before members of the Department designated by the Secretary. The Secretary, or persons designated by him to hear the case, shall have the power to subpoena witnesses and compel their attendance, administer oaths and require the production for examination of any books or papers relating to any matter under investigation in any such hearing. The respondent to a complaint made by it, or to it, pursuant to this chapter, shall subpoena and compel the attendance of such witnesses as the respondent may designate and require the production for examination of any books or papers relating to any matter under investigation in any such hearing. (60 Del. Laws, c. 648, § 1; 63 Del. Laws, c. 369, § 1.)

§ 7113. Appeals of final orders.

(a) Any person or persons who jointly or severally are substantially affected and aggrieved by any final order or variance of the Department, or any taxpayer, or any officer, department, board or bureau of the State may appeal that order to the State Environmental Appeals Board and to the Superior Court as provided in §§ 6008 and 6009 of this title except that the word "variance" shall be substituted for the word "permit" in subsections (b) and (e) of § 6008 of this title.

(b) No appeal shall operate to stay automatically any action of the Secretary, but upon application, and for good cause, the Secretary or the Court of Chancery may stay the action pending disposition of the appeal. (60 Del. Laws, c. 648, § 1; 63 Del. Laws, c. 369, § 1.)

§7120. Powers and duties of Department of Public Safety.

(a) The Department of Public Safety, after consideration with the Secretary of the Department of Transportation and upon approval of the Secretary of the Department of Natural Resources and Environmental Control, shall have the power and its duty shall be to:

(1) Adopt regulations, after public hearing, establishing the standards, test procedures and instrumentation to be utilized in the control of noise from motor vehicles;

(2) Adopt regulations, after public hearing, necessary for the inspection of motor vehicles, including noise control and abatement equipment to assure compliance with the noise standards promulgated by the Department.

(b) For any public hearings required by this subchapter, the procedure shall conform to the procedure established in §6006 of this title. (60 Del. Laws, c. 648, §1; 63 Del. Laws, c. 369, §1.)

Subchapter II. Motor Vehicles

§7121. Motor vehicle noise inspection.

Any motor vehicle which is subject to inspection by the Division of Motor Vehicles or any other duly authorized body shall, as a condition of compliance with said inspection, pass such tests as may be required to demonstrate that the motor vehicle is in compliance with all state and federal standards and requirements for the control of noise which are applicable to such motor vehicles (60 Del. Laws, c. 648, §1; 63 Del. Laws, c. 369, §1.)

§7122. Motor vehicle violations; enforcement.

Any person who operates a motor vehicle or owns a motor vehicle which he permits to be operated upon public highways of this State which generates noise in excess of standards adopted by the Department of Public Safety shall be fined not less than $25 nor more than $1,000, which shall be enforced in accordance with Chapter 7 of Title 21. (60 Del. Laws, c. 648, §1; 63 Del. Laws, c. 369, §1.)

§7123. Liberal interpretation.

The powers, duties and functions vested in any state department under this chapter shall not be construed to limit in any manner the powers, duties and functions vested therein or in any person under any other provision of law, or any civil or criminal remedies now or hereafter available to any person related to community noise control. (60 Del. Laws, c. 648, §1; 63 Del. Laws, c. 369, §1.)

§7124. Other ordinances or remedies.

(a) No existing civil or criminal remedy now or hereafter available to any person shall be superseded by this chapter or any rule or regulation promulgated pursuant thereto.

(b) No ordinances or resolutions of any governing body of a municipality or county or board of health which establish specific standards for the level or duration of community noise equivalent to or more stringent than those provided by this chapter or any rule or regulation promulgated pursuant thereto shall be superseded. Nothing in this chapter or in any rule or regulation promulgated pursuant thereto shall preclude the right of any governing body of a municipality or county board of health to adopt ordinances, resolutions or regulations which establish specific standards for the level or duration of community noise equivalent to or more stringent than this chapter or any rule or regulation promulgated pursuant thereto. (60 Del. Laws, c. 648, §1; 63 Del. Laws, c. 369, §1.)

§7125. Exemptions.

(a) All farm vehicles are exempted from this chapter while engaged in farming operations.

(b) Sirens operated to summon volunteer firemen to alarms and sirens used to summon ambulance crews to service calls are exempted from this chapter. (60 Del. Laws, c. 648, §1; 63 Del. Laws, c. 369, §1.)

STATE OF DELAWARE
DEPARTMENT OF NATURAL RESOURCES
& ENVIRONMENTAL CONTROL
DIVISION OF ENVIRONMENTAL CONTROL
AIR RESOURCES SECTION
EDWARD TATNALL BUILDING
P.O. BOX 1401
DOVER, DELAWARE 19901
Telephone (302) 736-4791

Pursuant to Provisions of
Part VII, 7 *Del. C.*, Chapter 71, Section 7105
Regulations Governing the Control of Noise
Per Order No. 82-A-2 of January 20, 1982
As Amended July 8, 1982

Sec. 71-I-1 Short Title

These regulations may be cited as the "Noise Regulations of the State of Delaware".

Sec. 71-I-2 Scope

Pursuant to the provisions of Part VII, Title 7, Chapter 71 of the Delaware Code, these regulations are to prevent, prohibit and provide for the abatement of excess and unnecessary noise and/or vibration which may endanger the health, safety and welfare, jeopardize the value of property and erode the integrity of the environmental [sic] of the people of this state.

Sec. 71-I-3 Definitions

3.0.1 "Ambient Noise" means the all-encompassing background noise associated with a given environment without the sound contribution of the specific source in question.

3.0.2 "A-Weighted Sound Level" means the sound pressure level in decibels as measured with a sound level meter using the A-weighting network, which compensates for human hearing characteristics. The level so read is designated dB(A) or dBA.

3.0.3 "Best Practical Noise Control Measures" means noise control devices, technology, and procedures determined or approved by the Secretary to be the best practical, taking into consideration the age of the equipment and facilities involved, the process employed, capital expenditures, maintenance cost, technical feasibility and the engineering aspects of the applicable noise control techniques in relation to the control achieved and the non-noise control environmental impact.

3.0.4 "Commercial Area" means land used for purposes such as retail sales, personal services, civic centers, hotels, offices and office buildings, wholesale and warehouse storage.

3.0.5 "Construction" means any site preparation, assembly, erection, placement, demolition, substantial repair, alteration or similar action for public or private rights-of-way, structures, utilities or similar property.

3.0.6 "Day" means the hours between 7:00 a.m. and 10:00 p.m.

3.0.7 "Day-Night Average Sound Level (Ldn)" means the 24-hour energy average of the A-weighted sound pressure level, with the levels during the period 10:00 p.m. to 7 a.m. weighted by 10 dBA before averaging.

3.0.8 "Decibel (dB)" means a standard unit for measuring the sound pressure level. It is equal to 20 times the logarithm to the base 10 of the ratio of the pressure of the sound measured to a reference pressure, which is 20 micropascals.

3.0.9 "Emergency" means any occurrence or set of circumstances involving actual or imminent physical trauma or property damage which demands immediate actions.

3.0.10 "Equivalent A-Weighted Sound Level, abbreviated Leq(x)dB(A), means the constant sound level that, in a given situation and time period (x), contains the same sound energy as the actual time-varying A-weighted sound.

3.0.11 "Farm Vehicle" means a wheeled device used for transportation in farming operations.

3.0.12 "Hertz (Hz) means a unit of measurement of frequency formerly stated as, and numerically equal to, cycles per second.

3.0.13 "Impulse Sound" means sound of short duration, much less than one second, with an abrupt onset and rapid decay, separated in time by at least one second.

3.0.14 "Industrial Area" means land used for purposes such as publishing, research, development, testing, manufacturing, processing, fabricating or repairing, and may include residential land use, for a caretaker, watchman or janitor.

3.0.15 "Infrasonic Sound" means sound pressure levels having frequencies below 16 Hz.

3.0.16 "Intrusion Alarm" means a device with an audible signal which, when activated, indicates intrusion by an unauthorized person.

3.0.17 "Intrusive Noise" means unwanted sound which intrudes over and above the existing noise at a given location. The relative intrusiveness of the sound depends upon its amplitude, duration, frequency, time of occurrence and tonal or informational content as well as the prevailing ambient noise level. A sound pressure level of 3 dB(A) above the ambient level is normally just discernable, with levels of 5 dB(A) to 10 dB(A) the lower level region for complaints.

3.0.18 "Motorboat" means any vessel which operates on water and is propelled by machinery.

3.0.19 "Night" means the hours between 10:00 p.m. and 7:00 a.m.

3.0.20 "Noise" means any sound which annoys or disturbs humans or which causes or tends to cause an adverse psychological or physiological effect on humans, excluding all aspects of noise regulated by the Federal occupational Safety and Health Act.

3.0.21 "Noise Disturbance" means any sound which (a) endangers or injures the safety or health of humans or animals, or (b) annoys or disturbs a reasonable person of normal sensitivities, or (c) jeopardizes the value of property and erodes the integrity of the environment. Compliance with Sec. 71-I-6 herein shall constitute elimination of a noise disturbance.

3.0.22 "Octave" means the interval embracing eight diatonic degrees between two sounds having a basic frequency ratio of two. (One unit of the musical scale).

3.0.23 "Percentile Level" means the sound levels exceeded for the percentage of time in any measured period. L10, L50 and L90, the levels exceeded for 10%, 50% and 90% of the time, are frequently used as measures of peak, average and ambient levels respectively.

3.0.24 "Person" means any individual(s), corporation, company, association, society, firm, partnership or joint stock company, and includes the State and all of its political subdivisions, agencies and instrumentalities as well as any department, board or agency of the government of the United States.

3.0.25 "Pure Tone" means any sound which can be distinctly heard as a single pitch or a set of single pitches. For the purpose of this section, a pure tone shall exist if the one-third octave band sound pressure level in the band with the tone exceeds the arithmetic average of the sound pressure levels of the two contiguous one-third octave bands by 15 dB for bands with center frequencies less than 160 Hz, by 8 dB for bands with center frequencies of 160 Hz to 400 Hz, and by 5 dB for bands with center frequencies greater than 400 Hz.

3.0.26 "Real Property Boundary" means an imaginary line along the ground surface, and its vertical extension, which separates the real property owned by one person from that owned by another person, but not including intra-building real property divisions.

3.0.27 "Residential Area" means land used for the primary purpose of providing human living accommodations.

3.0.28 "Secretary" means the Secretary of the Department of Natural Resources and Environmental Control.

3.0.29 "Sound" means an oscillation in pressure, particle displacement, particle velocity or other physical parameters, in a medium with internal forces that causes compression and rarefaction of that medium. The description of sound may include any characteristic of such sound, including duration, intensity and frequency.

3.0.30 "Sound Amplifying Equipment" means any device for increasing the magnitude of the human voice, music or other sound.

3.0.31 "Sound Level" means the sound pressure level (SPL) obtained by the use of a sound level meter and frequency weighting network, such as A, B or C as specified in American National Standards Institute specifications for sound level meters (ANSI S1.4-1971, or the latest approved revision thereof). The unit of measurement is the decibel. If the frequency weighting employed is not indicated, the A-weighting shall apply.

3.0.32 "Sound Pressure" means the instantaneous difference between the actual pressure and the average or barometric pressure at a given point in space, as produced by sound energy.

3.0.33 "Stationary Noise Source" means a device which creates sound while fixed in position, including but not limited to residential, commercial or industrial machinery, pumps, fans, compressors, air conditioners and refrigeration equipment.

3.0.34 "Ultrasonic Sound" means sound pressure levels having frequencies above 20,000 Hz.

3.0.35 "Vibration" means an oscillatory motion of solid bodies of deterministic or random nature described by displacement, velocity, or acceleration with respect to a reference point, such that;

$v = 2\pi f d$ where v = Velocity, f = Frequency and d = Peak Displacement
$a = 2\pi f v$ where a = Acceleration Amplitude

3.0.36 "Weekday" means any day Monday through Friday which is not a legal holiday.

Sec. 71-I-4 Prohibited Acts

4.0.1 Noise Disturbance Prohibited — No person shall make, continue, or cause to be made or continued, any noise disturbance. Non-commercial public speaking and public assembly activities conducted on any public space or public right-of-way shall be exempt from this section, provided they conform to all local ordinances.

4.0.2 Specific Prohibitions

(1) Radios, Television Sets, Musical Instruments and Similar Devices — Operating, playing or permitting the operation or playing of any radio, television, phonograph, drum, musical instrument, sound amplifier, automobile radio, automobile stereo or high fidelity equipment or similar device which produces, reproduces or amplifies sound:

(a) In such a manner as to create a noise disturbance within a receiving property.

(b) In such manner as to create a noise disturbance within any receiving property when operated in or on a motor vehicle on a public right-of-way or public space, or in a boat on public waters.

(c) In such manner as to create a noise disturbance to any person other than the operator of the device, when operated by any passenger on a common carrier.

(2) Animals and Birds — Owning, possessing, harboring or controlling any animal or bird which barks, bays, cries, squawks or makes any other noise continuously or *incessantly for a period of ten minutes* or makes such noise *intermittently for one-half hour* or more causing a noise disturbance within a receiving property; provided, however, that at the time the animal or bird is making such noise no person is trespassing or threatening to trespass upon private property in or upon which the animal or bird is situated or for any other legitimate cause which teased or provoked the animal or bird.

(3) Loading or Unloading — Loading, unloading, opening, closing, or other handling of boxes, crates, containers, building materials, garbage cans, or similar objects between the hours of 10:00 p.m. and 7:00 a.m. the following day in such manner as to cause a noise disturbance within a Class A receiving property. This section shall not apply during an emergency.

(4) construction — Operating or permitting the operation of any tools or equipment used in construction, drilling, or demolition work:

(a) Between the hours of 10:00 p.m. and 7:00 a.m. the following day, on weekdays and Saturdays, or at any time on Sundays or holidays, such that the sound therefrom creates a noise disturbance within a Class A receiving property, except during an emergency.

(b) At any other time such that the sound level within any receiving property exceeds an Leq of 85 dBA for a period of one hour.

(c) This section shall not apply to the use of domestic power tools subject to Section 4.0.2(8).

(5) Vehicle, Motorboat, or Aircraft Repairs and Testing — Repairing, rebuilding, or testing any motor vehicle, motorcycle, motorboat, or aircraft in such a manner as to cause a noise disturbance within a Class A receiving property between the hours of 10 p.m. and 7 a.m.

(6) Places of Public Entertainment — Operating, playing, or permitting the operation or playing of any radio, television, phonograph, drum, musical instrument, sound amplifier or any other device which produces, reproduces, or amplifies sound within any place of public entertainment at a sound level greater that 85 dB(A) as read by the slow response on a sound level meter at any point that is normally occupied by a customer unless a conspicuous and legible sign is located outside such place, near each public entrance stating "WARNING: SOUND LEVELS WITHIN MAY CAUSE PERMANENT HEARING IMPAIRMENT". All places of public entertainment shall also be required to comply with all of the provisions of this Regulation, specifically Section 6.

(7) Explosives, Firearms, and Similar Devices — The use or firing of explosives, firearms or similar devices which create impulsive sound so as to cause a noise disturbance

within a Class A receiving property or on a public right-of-way, except for licensed game-hunting activities on property where such activities are authorized.

(8) Domestic Power Tools — Operating or permitting the operation of any mechanically powered saw, drill, sander, grinder, lawn or garden tool, snowblower, or similar device in residential areas between the hours of 10:00 p.m. and 7:00 a.m. so as to cause a noise disturbance within a Class A receiving property.

(9) Tampering

(a) No person shall operate any equipment unless all noise and/or vibration control devices installed thereon are in full operation.

(b) No person shall tamper with, circumvent or remove any sound level monitoring instrument, meter or device positioned by or for the Department.

(c) No person shall remove or deface a noise label on any product.

4.0.3 Motor Vehicle Prohibitions.

(1) Motor Vehicle and Motorcycles on Public Rights-of-Way — No person shall operate or cause to be operated a public or private motor vehicle or motorcycle, or any equipment attached to such a vehicle, on a public right-of-way at any time in such a manner that the sound level emitted by the motor vehicle or motorcycle, or any equipment attached to such a vehicle, exceeds the level set forth in Title 7, Chapter 71, Subchapter II, Delaware Motor Vehicle Noise Regulations.

(2) Standing Motor Vehicles and Motorcycles — No person shall operate or permit the operation of any motor vehicle, motorcycle, or any auxiliary equipment attached to such a vehicle in such a way as to cause a noise disturbance within a Class A receiving property, for a period longer than twenty minutes in any hour while the vehicle is stationary,

for reasons other than traffic congestion. (Also see Sec. 71-I-4.02 (3) Loading or Unloading).

(3) Unnecessary Horn Blowing — No person shall at any time sound the horn or other warning device of a vehicle in such a way as to cause a noise disturbance within a Class A receiving property except when absolutely necessary as a warning while actually driving such vehicle.

Sec. 71-I-5 Classification of Land According to Use

5.01 Class A noise zone

Lands designated Class A shall generally be residential areas where human beings sleep or areas where serenity and tranquility are essential to the intended use of the land.

The land uses in this category shall include, but not be limited to, single and multiple family homes, hotels, prisons, hospitals, religious facilities, cultural activities, forest preserves, and land intended for residential or special uses requiring such protection.

5.0.2 Class B noise zone

Lands designated Class B shall generally be commercial in nature, areas where human beings converse and such conversation is essential to the intended use of the land.

The land uses in this category shall include, but not be limited to, retail trade, personal, business and legal services, educational institutions, government services, amusements, agricultural activities, and lands intended for such commercial or institutional uses.

5.0.3 Class C noise zone

Lands designated Class C shall generally be industrial where protection against damage to hearing is essential, and the necessity for conversation is limited.

The land uses in this category shall include, but not be limited to, manufacturing activities, transportation facili-

ties, warehousing, military bases, mining, and other lands intended for such uses.

5.0.4 Mixed Class Noise Zone

Good land planning arranges for Class A zones to be buffered from Class C zones by a Class B zone. Some areas are mixed zones in practice, wherein Class C land uses abut, adjoin or include Class A use. Whenever this situation comes to the attention of the Department, the person responsible for the objectionable noise source shall make every effort to conform with Section 71-I-6. A final acceptable noise limit shall be determined by the Secretary based on Best Practical Noise Control Measures.

Sec. 71-I-6 Maximum Noise and Vibration Limits

6.0.1 No person(s) shall operate or cause to be operated *any stationary source* of sound in such a manner as to create a 24-hour equivalent A-weighted sound level which exceeds the Leq limits set forth for the receiving land use category in Table 1 when measured at the point of complaint origination within the property boundary of the receiving land use. Any excedence of these values shall constitute a noise disturbance.

Table 1 Sound Levels by Receiving Land Use Zones, Leq (24) dBA

Emitter(s)	Receptor C	Receptor B	Receptor A 7 a.m. - 10 p.m.	Receptor A 10 p.m. - 7 a.m.
A	65	65	65	55
B	75	75	65	55
C	85	75	65	55

6.0.2 INTRUSIVE NOISE LEVEL

NOT WITHSTANDING THE PROVISIONS OF SECTION 6.0.1, A SOURCE SHALL BE CONSIDERED TO CAUSE A NOISE DISTURBANCE IF THE SOUND

LEVEL, OTHER THAN AN IMPULSE, INFRASONIC OR ULTRASONIC SOUND, EMITTED BY SUCH SOURCE EXCEEDS THE AMBIENT NOISE LEVEL BY 10 dBA WHEN MEASURED AT THE POINT OF COMPLAINT ORIGINATION WITHIN THE RECEIVING PROPERTY.

Note: The relative intrusiveness of sound depends upon its amplitude, duration, frequency, time of occurrence and tonal or informational content as well as the prevailing ambient noise level. A sound pressure level of 3 dB(A) above the ambient level is normally just discernable, with levels of 5 dB(A) to 10 dB(A) the lower level region for complaints.

Sec. 71-I-7 Exceptions.

Exempted from these regulations are:

7.0.1 FAA Controlled Operations — Noise directly caused by aircraft flight operations specifically preempted by the Federal Aviation Administration.

7.0.2 Recreational, Sports and Musical Activities — Noise created by the use of property for the purposes of recreational, sports or musical activities, provided such exemption is effective only during the specific period of time authorized by the political subdivision or government entity having lawful jurisdiction to sanction such use.

7.0.3 Emergencies — Noise created as a result of, or related to, an emergency, including (a) the emission of sound for the purpose of alerting persons to the existence of an emergency, or (b) the emission of sound in the performance of emergency work.

7.0.4 Emergency Signaling Device Tests —

(a) Testing of emergency signaling devices the same time of day each time such tests are performed, using a minimum cycle test time.

(b) Testing of the complete emergency signaling system, including the function of signaling devices and the personnel response to the signal, shall not occur more than once in each calendar month.

7.0.5 Religious Activities — Sounds created by bells, ca illons or chimes associated with religious observances.

7.0.6 Public Celebrations — Patriotic or public celebratio not extending more than one day or as authorized by the publ subdivision or government entity empowered to sanction suc activity.

7.0.7 Farm — All farm vehicles are exempt while engage in farming operations.

7.0.8 The Unamplified Human Voice — including childre at schools, playgrounds, etc.

7.0.9 Interstate Railway Locomotives and Rail Cars —Noi directly caused by railway operations specifically preempted b the Federal Government.

Sec. 71-I-8 Validity of Regulations

If any section or subsection of these regulations is foun invalid, the remainder shall continue to be valid and enforc able.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

THE BALTIMORE AND OHIO RAILROAD COMPANY, a corporation of the State of Maryland, d/b/a One of the Chessie System Railroads, THE BALTIMORE AND PHILADELPHIA RAILROAD COMPANY, a corporation of the States of Pennsylvania and Delaware, d/b/a One of the Chessie System Railroads, MOUNT CLAIRE PROPERTIES (DELAWARE), INC., a corporation of the State of Maryland, and CHESSIE MOTOR EXPRESS, INC., a corporation of the State of Delaware,	:	Civil Action
Plaintiffs,	:	No. 84-452
v.	:	
CHARLES M. OBERLY, III, Attorney General of the State of Delaware and JOHN E. WILSON, III Secretary of the Department of Natural Resources and Environmental Control of the State of Delaware,	:	
Defendants.	:	

STIPULATED FACTUAL MEMORANDUM

DATED: January 7, 1985

PRICKETT, JONES, ELLIOTT,
KRISTOL & SCHNEE
David S. Swayze
William E. Manning
Wendie E. Cohen
1310 King Street, P.O. Box 1328
Wilmington, Delaware 19899

Richard C. Keene, OF COUNSEL
General Attorney
The Baltimore and Ohio
Railroad Company
100 N. Charles Street
Baltimore, Maryland 21201
(301) 237-3121

ATTORNEYS FOR PLAINTIFFS

Fred S. Silverman
State Solicitor, State of Delaware

Michael T. Foster
John J. Polk
Deputy Attorneys General
Department of Justice
State Office Building
820 N. French Street
Wilmington, Delaware 19899
Phone (302) 571-2520

ATTORNEYS FOR
DEFENDANTS

The parties, by their counsel, hereby stipulate to the following matters:

I. GENERAL

A. Parties

1. The Baltimore and Ohio Railroad Company (herein designated "B&O"), is a corporation organized under the laws of the State of Maryland, for the interstate transportation of goods and persons by rail, with its principal place of business in Baltimore, Maryland, doing such interstate business in and through parts of Delaware as one of the Chessie System Railroads.

2. The Baltimore and Philadelphia Railroad Company (designated herein as "B&P"), is a corporation of the Commonwealth of Pennsylvania and of the State of Delaware and is a 99.85% subsidiary of B&O.

3. B&P owns property within the State of Delaware, New Castle County, including some which constitutes a portion of the intermodal facility which is the subject of this litigation.

4. Chessie Motor Express, Inc. (designated herein as "CMX") is a corporation of the State of Delaware with its principal place of business in Cherry Hill, New Jersey and is a licensed interstate motor carrier (ICC No. MC-152-494) of goods and freight.

5. Mount Clare Properties (Delaware), Inc. (herein designated as "MCP", is a corporation of the State of Maryland with its principal place of business in Richmond, Virginia. MCP is not a surface carrier engaged in interstate commerce.

6. MCP owns property within the State of Delaware, New Castle County, which constitutes a portion of the intermodal facility which is the subject of this litigation.

7. B&O is controlled (98.51%) by The Chesapeake and Ohio Railway Company (herein designated as "C&O), a Virginia corporation, non-plaintiff, and an interstate rail carrier. Both B&O and C&O trade as "Chessie System Railroads." C&O also owns and controls (100%) CMX. C&O is in turn owned and controlled (100%) by CSX Corporation (herein "CSX"), a Virginia corporation and not a plaintiff herein. CSX also owns and controls (100%) Seaboard System Railroad, Inc. (herein "SBD"), a Virginia corporation, non-plaintiff, and also an interstate rail carrier.

8. CSX, a publicly traded holding company which resulte from the 1980 merger of Chessie System, Inc. and Seaboar Coast Line Industries, Inc., also owns and controls CSX Re sources, Inc., a Virginia corporation and a non-plaintiff, which i turn controls MCP.

9. Charles M. Oberly, III, ("Oberly") is the Attorney Ger eral of the State of Delaware, and, as such, is charged with th duty to enforce the Delaware Noise Control Act, 7 *Del.C*. Sec tion 7106(5).

10. John E. Wilson, III ("Wilson") is the Secretary of th Department of Natural Resources and Environmental Contro ("DNREC") of the State of Delaware and, as such, is charge with the duty to enforce the Delaware Noise Control Act, *Del.C*. Section 7106(4) and (5); Section 7108(a).

11. Wilson advised B&O's attorneys on August 14, 198 that Oberly's office was preparing a Complaint seeking injunc tive action against B&O, CMX et al. at the Wilsmere Intermoda Facility for alleged violation of regulations of DNREC and of th Delaware Noise Control Act.

B. Jurisdiction and Venue.

1. This court has jurisdiction over the subject matter of thi action under 28 U.S.C. Section 1331, in that Federal statutor and constitutional questions are presented, and under 28 U.S.C Section 2201 ("Declaratory Judgment Act").

2. Venue is properly laid in this judicial district, pursuant t 28 U.S.C. Section 1391, in that all defendants reside or do bus ness in this district, the claim arose in this district, and th facility sought to be regulated lies in New Castle County Delaware.

II. STATUTORY AND REGULATORY HISTORY

A. Federal Noise Control Act, and Regulations Thereunder Applicable to Railroad Equipment and Facilities

1. The Federal Noise Control Act, now Title 42, Sections 4901 through 4918, was enacted October 27, 1972, Public Law 92-574.

2. Legislative history is contained in 1972 U.S. CODE CONG. & AD. NEWS, 4655-4698. Original statute proposed as S.1160, February 19, 1971. Similar Bill proposed as H.R. 11021 on September 30, 1971, and favorably reported February 19, 1972. Second Senate version introduced as S.3342, March 14, 1972 (Senators Tunney and Muskie). S.3342 contained the first language relative to interstate carriers (air, rail, motor). Senate and House Committee Hearings, and Joint Committee Hearings held February 29, 1972 through October 18, 1972. S.3342 version, blended with H.R. 11021 and as amended, passed by Committee on Public Works October 13, 1972 and by Senate and House on October 18, 1972.

3. February 1, 1973; Advance Notice of Proposed Rulemaking, adding 40 C.F.R. pt. 201, proposed by Federal Environmental Administration (hereinafter "EPA"); 38 Fed. Reg. 3086-3087 (1973).

4. January 31, 1974; August 16, 1974; responses and comments of the Federal Department of Transportation (hereinafter "FDOT") filed regarding the rules proposed by the Advance Notice.

5. July 3, 1974; EPA proposed Emission Standards concerning Railroad Noise, 40 C.F.R. pt. 201 §§ 201.1, 201.10-201.13; 39 Fed. Reg. 24580-24588 (1974).

6. August 14, 1974; Public Consultation Meeting scheduled by EPA at Des Plaines, Illinois to provide a forum for interested parties to exchange information and views with each other and the agency respecting the interests of the following sectors: State and local governments, industry parties, environmental parties and private citizens. Meeting Notice, 39 Fed. Reg. 28316 (1974).

7. August 19, 1974; the Association of American Railroads (hereinafter "AAR") filed comments and certain objections to the

formally proposed rules. See *Association of American Railroads v. Costle*, 562 F.2d 1310, 1312 (D.D.C. 1977).

8. July 14, 1975; further comments of FDOT filed concerning the formally proposed rules of July 31, 1974 *Id.*

9. January 14, 1976; Results of compliance meetings released, and revised Final Railroad Noise Emission Standards, 40 C.F.R. pt. 201 §§ 201.1, 201.10-13, 201.20-201.24, 41 Fed. Reg. 2184-2197 (1976).

10. April 14, 1976; Petition filed by Association of American Railroads ("AAR") *et al.* in the United States Court of Appeals, District of Columbia Circuit, (No. 76-1353) against Russell E. Train, EPA Administrator, to review the final regulations of EPA proposed January 14, 1976, to declare the same unlawful, and to require EPA to promulgate required regulations.

11. November 29, 1976; EPA filed Notice of Proposed Rulemaking concerning Railroad Noise Emission Regulations, 41 Fed. Reg. 52317-52320 (1976).

12. January 27, 1977; Comments of the AAR filed with the EPA, Office of Noise Abatement and Control, in reference to the November 29, 1976 Notice of Proposed Rulemaking, citing pendency of *AAR v. Train*; "Railroad Noise Emission Standards; Special Local Determinations," EPA Docket No. 76-10 (1977).

13. August 23, 1977; Decision issued in the case of *AAR v. Costle (Substituted for Train)*, 562 F.2d 1310, (D.D.C. 1977), directing EPA to reopen and reconsider Railroad Noise Emission Standards.

14. August 23, 1977; Compliance regulations promulgated by FDOT-FRA, effective October 1, 1977; 42 Fed, Reg. 42343-42349 (1977) (to be codified at 49 C.F.R. pt. 210).

15. April 17, 1979; EPA filed Notice of Proposed Rulemaking, Noise Emission Standards for Transportation Equipment; Interstate Rail Carriers, 40 C.F.R. pt. 201, pursuant to *AAR v. Costle;* 44 Fed. Reg. 22960-22972 (1979).

16. January 4, 1980; EPA promulgated Final Rule; Noise Emission Standards for Transportation Equipment; Interstate Rail Carriers, 40 C.F.R. pt. 201; adding §§ 201.14, 201.15, 201.16, 201.25, 201.26, 201.27, 201.08, and revising §§ 201.23

and 201.24, effective January 15, 1984, retaining regulations promulgated January 14, 1976 until January 14, 1984; 45 Fed. Reg. 1252-1271 (1980).

17. September 30, 1980; EPA published Notice of Availability of New Data and Advance Notice of Intent Concerning Noise Emission Standards for Transportation Equipment; Interstate Rail Carriers, (so-called "property line standards" for railroad yards), 40 C.F.R. pt. 201; 45 Fed. Reg. 64876-64877 (1980).

18. November 14, 1980; AAR filed extensive comments concerning objections to the September 30, 1980 Notice of Availability of New Data and Advance Notice of Intent.

19. November 12, 1981; Status Report prepared and filed by Attorneys for AAR, Attorneys for EPA and Attorneys for Intervenor (State of Illinois) in the U.S. Court of Appeals, District of Columbia Circuit No. 76-1353, *AAR v. Costle*.

20. November 24, 1981, Agreement to Dismiss, based upon the Status Report, filed in Case No. 76-135, *AAR v. Costle*.

21. November 22, 1982; EPA withdrew proposals of September 30, 1980; 47 Fed. Reg. 54107 (1982).

22. August 11, 1983; FDOT-FRA issued Notice of Proposed Rulemaking to revise scope of Railroad Noise Emission Compliance Regulations; 49 CFR pt. 210; 48 Fed. Reg. 36437-36493 (1983).

23. December 23, 1983; Final Rule promulgated by FDOT-FRA on Railroad Noise Emission Compliance Regulations; effective January 15, 1984; 48 Fed. Reg. 56757-56762 (1983) (to be codified at 49 CFR pt. 210).

B. Delaware Noise Control Act and Regulations.

1. Noise Control and Abatement Act adopted by Delaware General Assembly, 60 Del. Laws Chapter 648, Section 1 July 2, 1976; reenacted 63 Del. Laws Chapter 369, July 2, 1982; currently codified as 7 *Del.C.*, Ch. 71, §§ 7102-7125.

2. January 20, 1982, Regulations promulgated by Wilson, Secretary — DNREC; Regulations Amended July 8, 1982; currently Delaware Noise Control Regulations, §§ 71-1-1 through 71-1-8.

C. Federal Noise Control Act and Regulations Applicable to Motor Carriers.

1. Motor Carrier noise emission standards were first controlled by Public Law 92-574, enacted October 27, 1972. History of Statute in Item II.A.2., above.

2. Applicable Regulatory Standards, 40 C.F.R. pt. 202, were adopted October 29, 1974; 39 Fed. Reg. 38215-38216 (1974).

3. Applicable Compliance Regulations, 49 C.F.R. pt. 325, were adopted September 12, 1975; 40 Fed. Reg. 42437-42441 (1975).

III. TOFC OPERATIONS IN GENERAL

1. TOFC is a railroad acronym for "Trailers On (rail) Flat Cars".

2. COFC is a railroad acronym for "Containers On (rail) Flat Cars".

3. "Intermodal Facility" is a transportation facility which involves a change in the mode of transportation of freight; in railroad industry it involves TOFC or COFC operations or both.

4. A TOFC operation involves the transfer of loaded and sealed freight trailers from the backs of railroad flatcars to the ground, with subsequent connection to an over-the-road truck tractor or cab for continued transportation, and, conversely, the disconnection of a trailer attached to such a tractor or cab and the placement of said trailer upon the back of a railroad flatcar for continued transportation.

5. A COFC operation involves the transfer of loaded and sealed freight containers from the backs of railroad flatcars to the ground, to be placed on flatbed trailers connected to an over-the-road truck for continued transportation, and, conversely, the disconnection of the container from the flatbed trailer and the placement of said container upon the back of a railroad flatcar for continued transportation.

6. Overall TOFC or COFC movements also include other intermodal operations at shipping terminals where such trailers or containers are placed or loaded upon, or removed or unloaded

from, maritime vessels (ships or barges) for an initiation or continuation of transit in international or interstate commence; such maritime intermodal facilities generally do not directly involve railroad operations.

7. A "railroad facility" includes any area on which railroad equipment operates.

8. Railroad TOFC shipments are performed under "ramp-to-ramp" or "door-to-door" railroad contracts or tariffs.

9. Ramp-to-ramp shipments are performed under railroad movement waybills from one TOFC ramp where trailers are loaded onto railroad flatcars to another TOFC ramp where such trailers are unloaded from such flatcars.

10. Door-to-door shipments are performed under railroad contract and movement waybill from the shipper's plant via tractor cab to one TOFC ramp, onto rail flatcars, then off of such cars at another TOFC ramp, and via tractor cab drayage to consignee's warehouse or delivery point.

11. Ramp-to-ramp shipment sequence is generally as follows:

(a) Produce contracts with shipper.

(b) Shipper loads produce on trailers or containers leased or owned by shipper or onto units provided by the railroad and/or the drayage company(ies).

(c) Shipper arranges for railroad transportation by TOFC or COFC.

(d) Shipper delivers trailer or container to railroad ramping facility.

(e) Railroad transport shipment to destination specified in shipping document.

(f) Railroad delivers shipment to TOFC or COFC terminal, the designated off-ramp facility, either to the consignee or to the drayage operator specified in the shipping document.

12. The only difference between a "ramp-to-ramp" and "door-to-door" movement or shipment is that the railroad provides the drayage at each end of a trip which is "door-to-door," and the shipper specifies the drayage operator or contractor on a "ramp-to-ramp" shipment.

13. A "Movement Waybill" is a transportation document prepared by railroad personnel to accompany freight being delivered in interstate or intrastate commerce, depending upon the routing instructions given by the shipper or consignee on the shipping document; it identifies the shipment by trailer or container unit and number and by any "special price quotation."

14. A "shipping document" is the written transportation instruction given to the railroad or drayage operator by the shipper or consignee to transport the freight in intrastate or interstate commerce; it is prepared by shipper and accompanies the trailer until delivery to consignee.

15. The shipping document refers to the shipment by: (a) trailer or container numbers; (b) commodity description and quantity; (c) special price quotations (originated by railroad). The shipping document may also contain the time limits for deliveries, as dictated by the shipper or consignee.

16. Routing of shipment is dictated by Movement Waybill, and necessity of railroad classification, car consist and available routing. However, the Chessie System Railroads and the Seaboard System Railroads reserve the right to ship traffic over any route between origin and destination terminals.

17. In most cases, a separate movement waybill is executed for each trailer or container transported in TOFC or COFC Service. The exception to this practice is that a single movement waybill is issued for two trailers having identical "special price quotation numbers" and destinations and loaded on the same flatcar. When two trailer or container units are moved under one movement waybill, both unit numbers are shown on the waybill. Both the Chessie System Railroads and the Seaboard System Railroads otherwise treat each trailer or container as a separate movement, even in situations where a single shipment is contained in more than one trailer or container.

18. Any shipment between a shipper and a consignee may easily fill more than one trailer. In such situations, Chessie System Railroads treat each trailer or container tendered as a separate movement unless such trailers or containers are on the same flatcars. Freight bills, however, are generated on a per trailer or per container basis.

19. Since some delivery appointment times are not made until the units are enroute via rail, or, occasionally, even when the units are at the "destination" TOFC or COFC terminal, a movement Waybill or Shipping Document can be amended for time of delivery. However, the policy of the Chessie System Railroads (and Seaboard System Railroads) states that there are no reconsignments of shipments while enroute beween the origin and destination TOFC or COFC terminals.

20. Trailers, while located at the intermodal facility that is the subject of this litigation, are in interstate commerce.

21. Technological changes in the railroad industry over the last thirty (30) years have resulted in an increase in intermodal facilities and a shift in use from formerly exclusive-use rail equipment to more shipper-owned or third-party owned freight containers (including container boxes and trailers).

22. This trend in intermodal operations lowers a railroad's capital costs by using shipper-owned trailers and containers.

23. Railroads encourage shipper fleet ownership by adjusting transportation rates when shipper-owned equipment is utilized.

24. Use of refrigerated trailers in a TOFC operation involves a lesser chance of damage to or spoilage of perishable goods in transit than use of railroad box or reefer cars, by lessening occasions to physically load, unload or otherwise handle the same, or lessening opportunities for exposure to weather or other outside conditions.

25. The Chessie System Railroads maintain Intermodal Facilities at the following locations:

Baltimore, MD (Wicomico)

Baltimore, MD (Port Covington)

Chicago, IL

Cincinnati, OH (joint use with SBD, run by SBD)

E. St. Louis, IL (joint use with SBD, run by Chessie)

Grand Rapids, MI

Lordstown, OH

Louisville, KY (joint use with SBD, run by SBD)

Philadelphia, PA

Portsmouth, Va (joint use with SBD, run by SBD)

Richmond, VA

Toledo, OH

Wilmington, DE (Wilsmere)

Of these Facilities, only Baltimore (Port Covington) and Chicago Facilities have a present (December 1984) trailer capacity larger than that at Wilsmere.

IV. WILSMERE OPERATIONS

1. The present principal user of the Wilsmere TOFC Facility for the distribution of trailers which arrive inbound via rail flatcar, and exit via truck-tractor attachment, is Chessie Motor Express, Inc. ("CMX").

2. The present largest supplier of trailers which arrive inbound attached to truck-tractors, and depart outbound via rail flatcar, at the Wilsmere TOFC Facility is United Parcel Service, Inc. ("UPS").

3. Daily operations of the Wilsmere TOFC Facility include the removal of trailers from rail flatcars, the attachment of trailers to truck tractor cabs, the placement of trailers onto flatcars, the disconnection from truck tractor cabs, and the movement and temporary placing of trailers within the Facility as they await a change in transportation mode.

4. An independent truck terminal operator, Kane Transfer Company of Baltimore, Maryland ("Kane"), handles the daily

ramping service (lift-on, lift-off) and location/relocation of trailers within the Wilsmere TOFC Facility, through its own employees, under contract with B & O. Although Kane is engaged in interstate commerce, it is not a surface carrier by rail.

5. Kane uses seven (7) designated tractors (6-wheeled truck cabs) at the Wilsmere TOFC Facility to move and relocate trailers within the Facility, as follows: three (3) Capacity "Yard Jockey" diesel powered units on site November 1983; two (2) Ottawa "Model 30 diesel powered units, on site October 1982; one (1) Ottawa "Model 30" diesel powered unit, on site June 1984; and one (1) Ottawa "Model 30" gasoline powered unit, on site July 1984.

6. Each of the three (3) Capacity tractors have vertical exhaust systems manufactured by Stemko Campany (Part 190-9208); the four (4) Ottawa tractors have horizontal exhaust systems, manufactured by Stemko company (part number unknown); all industry approved sound mufflers.

7. Other equipment used by Kane at the Wilsmere TOFC Facility to service the piggyback train and truck interface are three (3) large side-loading forklift or crane style trucks ("sideloaders" or "piggypackers").

8. Each of the diesel sideloaders or piggypackers is equipped with industry approved sound mufflers, called "Cowl Silencers", cowl shrouds or mufflers manufactured by Temro Division, Budd of Canada, Inc. (Winnipeg, Manitoba). The "Cowl Silencers" were purchased from Diesel & Equipment Specialists Company (614 West Market Street, Bridegeville, DE 19933; Dale Braken), at the suggestion of Charles Wilkins, Delaware DNREC. The "Cowl Silencers" were installed on 2 of the sideloaders (one LaTourneau #2682-CH; one Raygo-Wagner #PC-90) March 13, 1984; the "Cowl Silencer" was installed on the third machine prior to delivery to Facility on August 8, 1984.

9. Operations of the sideloaders, piggypackers and designated tractor cabs are performed by employees of Kane.

10. 40 CFR pt. 201 does not set individual or specific standards for the noise emissions of sideloaders, piggypackers and/or designated tractor cabs.

11. Truck-tractor cabs are operated in and out of the Wilsmere TOFC Facility by each drayage (pick up and delivery) contractor.

12. CMX, under contract with B & O and other interstate rail carriers, provides pickup and delivery service (drayage) to and from the Wilsmere TOFC Facility under such railroad's door-to-door service.

13. UPS drays its own materials to the Wilsmere TOFC Facility (and from the receiving TOFC Facility) and contracts with B & O for ramp-to-ramp rail transportation out of Wilsmere.

14. Other independent trucking companies operate in and out of the Wilsmere TOFC Facility under drayage contracts with shippers or consignees who contract with B & O and other interstate rail carriers for ramp-to-ramp rail transportation service.

15. The drayage operators pickup or deliver trailer loads of freight to or from the Wilsmere TOFC Facility in accordance with the instructions of the shippers or consignees on the movement waybills and shipping documents presented to the drayers.

16. The combined drayage operators other than CMX average approximately 45 trailer loads per day at the Wilsmere TOFC Facility, on an annual basis subject to seasonal fluctuations.

17. "Door-to-door" shipments constitute approximately 60% of all shipments processed through the Wilsmere Facility; the remaining shipments are "ramp-to-ramp."

18. Approximately 35% of the trailers handled in "door-to-door" service at Wilsmere are privately owned, i.e., not owned or controlled (by lease) by a railroad. Almost all containers handled in "door-to-door" service at Wilsmere are similarly privately owned. Some of the trailers are leased to the transportation originating railroad. Some are owned by the shipper or consignee, if the shipper's or consignee's own traffic volume justifies such ownerships. Many are owned by investor groups or syndications, which in turn lease them to anyone who makes application, including shippers, consignees and railroads.

19. B & O, as other railroads engaged in trailer hauling, pays a trailer use charge to the trailer owner while the trailer is in the account of B & O, similar to the *per diem* charges paid or allowed

to owners of the other exclusive-use rail cars (boxcars, tank cars, hopper cars, gondola cars, automobiles racks, etc.).

20. B & O is responsible for all trailer use charges accrued from date of receipt of the trailer by B & O from a foreign (i. e. non-Chessie System) railroad or leasing company. B & O's responsibility for the trailer use charges ends when the trailer unit is either given back to the leasing company or interchanged (loaded or empty) back to the foreign railroad company.

21. The tractors used in "door-to-door" service are owned by the independent truckers. In the case of CMX, such tractors are owned by independent parties who subcontract their services to CMX.

22. Locomotives of B & O are operated in and through the TOFC facility by rail crews of the B & O.

23. B & O maintains an Assistant Terminal Manager at Wilsmere, who is responsible for all Facility operations and who reports to B & O's General Manager — TOFC-COFC operations in Baltimore.

24. B & O oversees operations at the Wilsmere TOFC Facility including clerical, administration, customer relations, interface with drayage contractors, supervision of Kane's operations, coordination of B & O Mechanical, Engineering and Transportation departments.

25. Trailers, including refrigerated trailers, are temporarily placed and/or "stored" at the TOFC Facility to accommodate whichever mode of transportation (rail or truck) is designed for the continuation of the journey of such trailer in commerce.

26. Employees of CMX are engaged in the drayage operation in and out of the Wilsmere TOFC Facility 7 days per week, Sunday through Saturday (excluding certain holidays).

27. CMX, as drayage operator, averages approximately 90 trailer loads per day at the Wilsmere TOFC Facility, on an annual basis subject to seasonal fluctuations.

28. The "Orange Blossom Special", a citrus and produce train originating in Florida on the SBD, commences rail movements in Florida around October 10 and runs through June.

29. During the peak season of the "Orange Blossom Special," (December through May), CMX moves an average of

3,000 trailer loads per month out of the Wilsmere TOFC Facility.

30. The refrigerated trailers used on the "Orange Blossom Special" service are leased or owned by SBD. Six hundred (600) are owned by SBD. Four hundred (400) are leased to SBD for 3 years by Brae Corporation; 100-200 others are on short term (30 day) leases. The 400 long-term leased trailers and 600 owned trailers are identified by unit numbers "RDSZ"; the others have various unit numbers.

31. CMX gross revenue is an average $250 per trailer load annually on all eastern seaboard traffic.

32. "Orange Blossom Special" traffic increases are reflected in the monthly schedules appearing at Section V paragraphs 1, 4, 7, 10 and 13 of this Stipulation.

V. STATISTICAL DATA — WILSMERE

1. The number of trains, both inbound to and outbound from the Wilsmere TOFC Facility within the 12-month period August 1, 1983 through July 31, 1984 was as follows:

Month:	Inbound:	Outbound:
August	29	26
September	27	23
October	39	37
November	52	47
December	51	51
January	52	48
February	51	49
March	58	53
April	53	53
May	60	56
June	57	49
July	38	58
Totals	567	550

2. The average number of trains, both inbound to and outbound from the Wilsmere TOFC Facility on a daily basis, by day of the week is as follows:

Day:	Inbound	Outbound
Sunday	3	2
Monday	2	1
Tuesday	2	3
Wednesday	3	3
Thursday	3	3
Friday	3	3
Saturday	3	3

3. The average number of trains, both inbound to and outbound from the Wilsmere TOFC Facility within the 12-month period August 1, 1983 through July 31, 1984 by daily shift, were as follows:

Shift:	Inbound:	Outbound:
7:00 AM — 3:00 PM	1	—
3:00 PM — 11:00 PM	2	1
11:00 AM — 7:00 AM	—	2

4. The number of tractor trailers (truck cabs), both inbound to and outbound from the Wilsmere TOFC Facility via road or street access within the 12-month period August 1, 1983 through July 31, 1984 was as follows:

Month:	Inbound (at Gate):	Outbound (Gate):
August	1069	583
September	986	441
October	1249	547
November	1577	1103
December	2095	1753
January	1265	1000
February	1332	842
March	1537	1241
April	2292	1914
May	3402	3217
June	2577	2432
July	1722	1121
Totals	21,103	16,194

5. The average daily number of tractor trailer cabs, both inbound to and outbound from the Wilsmere TOFC Facility at the gate, by day of the week, based upon a traffic count on March 13, and 19, 1984, is as follows:

Day:	Inbound (Gate):	Outbound (Gate):
Sunday	30	54
Monday	66	84
Tuesday	64	55
Wednesday	89	75
Thursday	78	54
Friday	68	36
Saturday	56	32

6. The average number of tractor trailer cabs, both inbound to and outbound from the Wilsmere TOFC Facility, within the 12-month period August 1, 1983 through July 31, 1984, by daily shifts, were as follows:

Shift:	Inbound (Gate):	Outbound (Gate):
7:00 AM — 3:00 PM	12	18
3:00 PM — 11:00 PM	13	25
11:00 PM — 7:00 AM	29	25

7. The number of refrigerated trailers, both inbound to and outbound from the Wilsmere TOFC Facility, within the 12-month period August 1, 1983 through July 31, 1984 was as follows:

Month:	Inbound (Gate):	Outbound (Gate):
August	—	—
September	—	—
October	—	105
November	—	672
December	—	1232
January	—	632
February	1	526
March	4	809
April	5	1325
May	6	1945
June	1	816
July	14	20
Totals	31	8082

8. The average number of refrigerated trailers, both inbound to and outbound from the Wilsmere TOFC Facility, by day of the week, is as follows:

Day:	Inbound (Gate):	Outbound (Gate):
Sunday	—	35
Monday	—	55
Tuesday	—	36
Wednesday	—	49
Thursday	—	35
Friday	—	23
Saturday	—	21

9. The average number of refrigerated trailers, both inbound to and outbound from the Wilsmere TOFC Facility, within the 12-month period August 1, 1983 through July 31, 1984, by daily shift, were as follows:

Shift:	Inbound (Gate):	Outbound (Gate):
7:00 AM — 3:00 PM	—	16
3:00 PM — 11:00 PM	—	8
11:00 PM — 7:00 AM	—	20

10. The number of trailers *other than* refrigerated, both inbound to and outbound from the Wilsmere TOFC Facility, within the 12-month period August 1, 1983 through July 31, 1984 was as follows:

Month:	Inbound (Gate):	Outbound (Gate):
August	1069	583
September	986	441
October	1249	442
November	1577	431
December	2095	521
January	1265	368
February	1331	316
March	1533	432
April	2287	589
May	3396	1272
June	2576	1616
July	1708	1101
Totals	21,072	8,112

11. The average number of trailers *other than* refrigerated, both inbound to and outbound from the Wilsmere TOFC Facility, by day of the week, is as follows:

Day:	Inbound	Outbound:
Sunday	30	19
Monday	66	29
Tuesday	64	19
Wednesday	89	26
Thursday	78	19
Friday	68	13
Saturday	36	11

The average number of trailers *other than* refrigerated, both inbound to and outbound from the Wilsmere TOFC Facility, by daily shift, were as follows:

Shift:	Inbound:	Outbound:
7:00 AM — 3:00 PM	12	2
3:00 PM — 11:00 PM	13	17
11:00 PM — 7:00 AM	29	5

13. The number of *outbound* (inbound on rail flatcar, removed at the TOFC Facility, and attached to truck tractor) *refrigerated* trailers for the period August 1, 1983 through July 31, 1984 originated as follows:

List of States	Number
Florida	8055
South Carolina	27
Total	8082

14. The number of *outbound* (inbound on rail flatcar, removed, and attached to truck tractor) *non-refrigerated* trailers for the periods August 1, 1983 through July 31, 1984 originated as follows:

List of States (*)	Number
Florida)	8112, No breakdown available
Alabama)	on per state basis
Georgia)	
North Carolina)	(*) As of July 16, 1984, one daily
South Carolina)	train arrives via St. Louis, with
Louisiana)	trailer traffic originating
Mississippi)	west of E. St. Louis, Illinois,
	with pickup at Cincinnati.

15. The number of *inbound* (brought to the TOFC Facility attached to truck tractor, detached, and placed on back of rail car) *refrigerated* trailers for the period August 1, 1983 through July 31, 1984 originated as follows:

List of States	Number
New Jersey	31 (all via CMX)

16. The number of *inbound* (brought to the TOFC terminal attached to truck tractor, detached, and placed on back of rail car) *non-refrigerated* trailers for the period August 1, 1983 through July 31, 1984 originated in the following states as follows:

List of States	Number
Delaware)	21,072, No breakdown
Pennsylvania)	available on per state
New Jersey)	basis
New York)	
Maryland)	
Connecticut)	
Massachusetts)	

VI. REFRIGERATED TRAILER DATA

1. Refrigerated trailers include those trailers capable of containing foods or other perishables therein in a frozen state, as well as such foods or perishables contained in a cool state or in a state of uniform temperature.

2. The refrigerated trailers are used to transport such produce and other perishables from point of origin to point of destination.

3. Refrigerated trailers, used in TOFC operations, vary in size from *lengths* of 40 feet to 45 feet; in *height* from 13 feet 4 inches to 13 feet 6 inches; and in *width* from 8 feet to 8 feet 6 inches.

4. Inside volume of the 45-foot long refrigerated trailers vary from 2808 cubic feet to 2926 cubic feet.

5. Spoilage rates for fruits, vegetables, foods, produce and other perishables (per publication of U.S. Department of Agriculture; USDA Handbook No. 105, "Protecting Perishable Foods During Transport By Motor Truck" (1970) and USDA Marketing Research Report No. 1122, "Shipping Alternatives for Moving Freight Products to Eastern and Western Ports (1982)) are dependent upon a multiplicity of factors, including:

— maturity of produce at harvest

— temperature of produce when loaded

— interior trailer temperature when produce is loaded

— humidity level of trailer

— heat and respiration of produce

— exterior temperature and humidity

— fluctuations in temperature in transit

6. Temperature settings of refrigerated trailers are established by shippers or consignees, and statutes and regulations of the U.S. Department of Agriculture.

7. Temperatures are required to be set in refrigerated trailers, used for cooling or maintenance of uniform temperature transportation of such produce and other perishables as follows (per publications of U.S. Dept. of Agriculture):

Food or perishable Class:	Temperature Setting:
Cabbage	32°F
Celery	32°F
Cucumbers	45-50°F
Oranges, Grapefruit	32°F
Tomatoes	55-60°F
Watermelon	40-50°F

8. Refrigerated trailers handled through the Wilsmere Facility are manufactured principally by:

(A) Great Dane Trailers, Inc. (912) 232-4471	Lathrop Avenue P.O. Box 67 Savannah, GA 34812
(B) Utility Trailer Company (915) 859-7906	P.O. Box 17970 El Paso, TX 79917

9. Air conditioners, coolers or compressors used in the refrigerated trailers handled through the Wilsmere Facility are manufactured primarily by:

(A) Thermo-King (612) 887-2236	312 W. 90th St. Minneapolis, MN 55420
(B) Carrier, Inc. ("Transicold" Division) (315) 432-6000	P.O. Box 4805 Carrier Parkway Syracuse, NY 13221

10. Air conditioners, coolers or compressors used on refrigerated trailers vary in size from 17,500 BTU to 37,500 BTU.

11. Most refrigerated trailers used for transportation of such produce and other perishables are owned by shippers, consignees, or trailer-leasing firms, which lease such trailers to shippers, consignees, investment firms or other parties.

12. The owner, or lessee under contract, of a trailer (whether refrigerated or non-refrigerated) is responsible for costs and expenses, including capital improvements and repairs to the trailer(s), absent negligent damage by a carrier.

13. In 1983-84 CMX leased or subleased about 400 of such refrigerated trailers from the owner(s), which CMX used or employed in the intermodal operations at Wilsmere. In 1984-85, such trailers are leased to SBD.

PRICKETT, JONES, ELLIOTT, KRISTOL & SCHNEE

By _____

David S. Swayze
William E. Manning
Wendie E. Cohen
1310 King Street, P.O. Box 1328
Wilmington, Delaware 19899
(302) 658-5102

Richard C. Keene, OF COUNSEL
General Attorney
The Baltimore and Ohio
Railroad Company
100 N. Charles Street
Baltimore, Maryland 21201
(301) 237-3121

ATTORNEYS FOR PLAINTIFFS

By: _____

Fred S. Silverman
State Solicitor, State of Delaware
Michael T. Foster
John J. Polk
Deputy Attorneys General
Department of Justice
State Office Building
820 N. French Street
Wilmington, Delaware 19899
Phone (302) 571-2520

ATTORNEYS FOR DEFENDANTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ASSOCIATION OF AMERICAN RAILROADS, et al., *Petitioners,*	)	
v.	)	
DOUGLAS M. COSTLE, Administrator, Environmental Protection Agency, et al., *Respondents,*	)	No. 76-1353
The State of Illinois, *Intervenor.*	)	

STATUS REPORT

Pursuant to Section 17 of the Noise Control act of 1972 (Act), 42 U.S.C. §4916, on December 31, 1975, the Environmental Protection Agency (EPA) promulgated a final regulation setting noise emission standards for railroad locomotives and railcars operated by interstate carriers. 41 Fed. Reg. 2184. The Association of American Railroads (AAR) subsequently brought suit to require EPA to publish further noise standards for railroads. By decision of this court on August 23, 1977, 562 F.2d 1310, Respondents were directed to promulgate additional standards covering railroad "facilities and equipment."

On September 24, 1979, this Court granted Respondents' Motion For An Enlargement Of Time For Promulgating Final Standards. Respondents requested and received an extension until January 23, 1980, for publication of standards applicable to specific sources of railroad noise, and an extension until January 23, 1981, for publication of standards for overall limits on railroad noise (hereafter referred to as "property line standards"). The deadline for property line standards was further extended to May 26, 1981, by this Court's Order of February 13, 1981, and to November 26, 1981, by this Court's Order of June 26, 1981.

EPA promulgated the final standards for specific sources of railroad noise on January 4, 1980. 45 Fed. Reg. 1252. EPA also has published a Notice of Proposed Rulemaking for property line standards. 44 Fed. Reg. 22960-72 (April 17, 1979).

On September 30, 1980, EPA published a Notice Of The Availability Of New Data And Advance Notice Of Intent relevant to the property line standards, 45 Fed. Reg. 64876-77, and received in response extensive comments submitted by Petitioner AAR which, *inter alia*, raised the possibility that further standards might not be needed. AAR argued that the standards promulgated to date constitute complete and effective compliance with the statutory mandate for regulation of rail facility and equipment noise emissions "achievable through the application of the best available technology taking into consideration the cost of compliance" (42 U.S.C. §4916), and additionally questioned the feasibility of, and the necessity for, the proposed property line standards for railroad noise.

Following discussion of these matters with the parties and review of the standards currently in effect, Respondents have concluded that no further standards are necessary to regulate rail facilities and equipment. The standards already promulgated by EPA, including those in response to this Court's order, encompass numerous standards covering major sources of railroad noise: standards for locomotives manufactured before 1980, locomotives manufactured after December 31, 1999, and rail cars, 41 Fed. Reg. 2184; and standards for locomotive load cell test stands, switcher locomotives, retarders, and car coupling operations, 45 Fed. reg. 1252. No petitions were filed to review the standards promulgated after the Court's decision in this case.

Respondents believe that the cumulative effect of these standards, which were based on the noise abatement achievable through the application of the best available technology taking into consideration the cost of compliance, effectively regulate both railroad equipment and railroad facilities. The standards promulgated to date cover the major sources of noise from railroad equipment which in turn generate a large proportion of the noise emissions from rail facilities. Since the cumulative effect of regulating equipment used within railyards is also to regulate to

a significant degree noise emissions from rail facilities, the parties agree that it is unnecessary for EPA to establish furher property line facility emission standards specifically for railyards.

In consideration of these facts, EPA intends to withdraw its proposal to promulgate a property line standard for rail facilities. Respondents agree with Petitioner AAR that EPA has already effectively regulated railroad "equipment and facilities" in a manner "consistent with the customary usage of the phrase in the railroad industry," 562 F.2d at 1321, and in a manner consistent with the criteria contained in Section 17 of the Noise Control Act, and that national uniformity of treatment is effectively assured as the Federal standards become effective.

For the above-stated reasons, the parties agree that EPA has satisfied the Order of this Court directing the promulgation of railroad noise standards and accordingly have agreed to dismiss this case.

Respectfully submitted,

Richard J. Flynn

Lee A. Monroe
Sidley & Austin
1730 Pennsylvania Avenue, N.W.
Suite 1100
Washington, D.C. 20006

Attorneys for Association of
American Railroads, et al.

Nancy J. Marvel
Attorney
Department of Justice
Land and Natural Resources Division
Washington, D.C. 20530

Samuel I. Gutter
Attorney
Office of the General Counsel
Environmental Protection Agency
Washington, D.C. 20460

Reed W. Neuman
Assistant Attorney General
State of Illinois
500 S. Second Street
Springfield, Ill. 62706

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ASSOCIATION OF AMERICAN RAILROADS, et al.,	)	
Petitioners,	)	
v.	)	
DOUGLAS M. COSTLE, Administrator, Environmental Protection Agency, et al.,	)	No. 76-1353
Respondents,	)	
The State of Illinois,	)	
Intervenor.	)	

AGREEMENT TO DISMISS

Pursuant to Rule 42(b) of the Federal Rules of Appellate Procedure, Petitioner, Association of American Railroads, et al., Respondents, Administrator of the Environmental Protection Agency, et al., and Intervenor, State of Illinois, hereby file this Agreement of Dismissal to dismiss this action. Each party shall bear his own costs.

Respectfully submitted,

_____

Richard J. Flynn

_____

Lee A. Monroe
Sidley & Austin
1730 Pennsylvania Avenue, N.W.
Suite 1100
Washington, D.C. 20006

Attorneys for Association of
American Railroads, et al.

Nancy J. Marvel
Attorney
Department of Justice
Land and Natural Resources Division
Washington, D.C. 20530

Samuel I. Gutter
Attorney
Office of the General Counsel
Environmental Protection Agency
Washington, D.C. 20460

Reed W. Neuman
Assistant Attorney General
State of Illinois
500 S. Second Street
Springfield, Ill. 62706

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

THE BALTIMORE AND OHIO RAILROAD COMPANY, et al. *Plaintiffs*	*	
vs.	*	CIVIL ACTION NO. 84-452-WKS
CHARLES M. OBERLY, III, Attorney General, et al. *Defendants*	*	

AFFIDAVIT

STATE OF MARYLAND :
: SS.
CITY OF BALTIMORE :

JOHN E. GILES, being duly sworn, deposes and states:

1. I am General Manager — TOFC/COFC Operations for The Baltimore and Ohio Railroad Company (hereinafter "B&O"), d/b/a one of the Chessie System Railroads ("CSR") and one of the plaintiffs herein, and have been General Manager - TOFC/COFC Operations since April 1, 1984, and have been employed by B&O in other marketing and management positions since November 1980.

2. As General Manager — TOFC/COFC Operations, I am responsible for the overall operation and management of all of the CSR TOFC and/or COFC terminals or facilities, including: supervising employees in administration, operation and marketing functions; general financial accountability; coordinating and developing cost and profit information; customer pricing; equipment allocation and maintenance; coordination of terminal or facility operations between CSR and the Seaboard System Railroads (SBD); terminal planning and development; negotiating contracts with connecting motor carriers, rail carriers, trailer leasing companies and other contractors; and I report directly to the Assistant Vice President — Intermodal.

3. As General Manager — TOFC/COFC Operations I maintain or have access to all records, including certain financial data, of B&O and other CSR relative to all CSR TOFC facilities and operations, and this Affidavit is made from personal knowledge and from such materials and records under my care.

4. The Intermodal Facility at Wilsmere, New Castle, Delaware is a TOFC operation, involving the interchange from railroad to truck mode, or truck to railroad mode, of sealed freight trailers which have travelled in interstate commerce and/or which will continue to travel in interstate commerce, without break in bulk or containment.

5. The preponderant majority of inbound-rail, outbound-truck, traffic annually at the Wilsmere Facility is perishable goods and produce (citrus, fruits, vegetables, and frozen meats) from southern U.S. growing regions destined for northeastern U.S. market distribution. Produce transportation season runs from October through June, with peak in March, April and May.

6. In July through September, the primary merchandise handled at the Wilsmere Facility is a general freight trailer mix, with perishable goods still comprising an average 3-5% of gross freight. The general freight trailer mix includes manufactured, finished and household goods (ex.: appliances, appliance parts, auto parts, machinery, tools, hardware, bulk paper rolls).

7. The perishable merchandise and foods (vegetables, fruits and meats) is transported in refrigerated trailers which are designed to preserve the merchandise and which are designed for use on both rail flatcar or as attached to truck tractor cabs.

8. Trailers containing perishable goods are designed and manufactured to include individual self-fueled continuous action generators or compressors to cool or maintain a constant temperature inside the trailer. Modern refrigerated trailer units are fully automated to control the internal temperature. The temperature controls are set at points of original load and are released only at points of unloading, with no change by B&O or Kane in transit.

9. Disengaging a trailer refrigeration unit during transit or storage will result in the total loss of all perishable cargo contained in the trailer.

10. Such refrigerated trailers are items of equipment used in railroad TOFC operations to perform certain functions formerly performed exclusively by or with railroad refrigerated boxcars (a/k/a "reefers" or "reefer boxes").

11. Similarly, other trailers are used in TOFC operations at Railroad Facilities to perform certain functions formerly performed exclusively by or with railroad boxcars or tank cars.

12. Trailers are stored on the rail ("topside" or "on car") or on the ground ("carside" or "trackside") only as long as necessary to accommodate whatever mode of transportation (rail or truck) is designed for the continuation of their interstate journey. Wherever possible, B&O, CMX and other users of the Facility synchronize the arrival and departure of trailer shipments so as *to minimize parking and storage time and maximize the competitive advantage to* be derived from delivering trailer loads to their destination faster than competing intermodal operations, interstate truckers, and air freight haulers. The longest trailer "turnaround time" in the Facility is 3 days; the average turnaround time is 3 hours.

13. Outbound-rail, inbound-truck traffic at the Wilsmere Facility originates from points in Delaware, New Jersey, New York, Pennsylvania and Maryland, destined for delivery to points in North Carolina south through Florida, and for points west through Ohio, Indiana, Illinois and the western U.S.

14. Inbound-rail, outbound-truck traffic at the Wilsmere Facility originates from various points in Florida north through Virginia, and from California east through Ohio, destined for delivery points in Delaware, Pennsylvania, New Jersey, New York, northeastern Maryland, the New England States and Canada.

15. The present principal user of the Wilsmere TOFC Facility for distribution of inbound-rail, outbound-truck traffic is Chessie Motor Express, Inc. ("CMX"), a corporate affiliate of B&O, and which continues the interstate transportation of the trailers by truck drayage to the north, west, east and south.

16. The present largest supplier of outbound-rail inbound-truck trailers to the Wilsmere Facility is United Parcel Service, Inc. ("UPS") which brings trailers for interstate transportation south to Florida points (Jacksonville, Orlando, Miami, et al.).

UPS trailers contain quantities of miscellaneous parcels of less than 75 pounds each, shipped by commercial and private individuals under their contracts with UPS, and consisting of various items (parts, personal items and jewelry, household goods, office supplies, etc., etc.).

17. Under contract with the U.S. Postal Service, B&O handles trailers of bulk mail in/out of Wilsmere, collected from the Philadelphia area, northern New Jersey and southern New York for rail transit west to Texas via East St. Louis, and inbound-rail from Texas, et al. to Philadelphia. This contract calls for incentive penalties for late shipments.

18. In 1984, 39,745 trailer loads were processed at the Wilsmere TOFC Facility. Based upon a 300 day (rail schedule) year, the *average* number of trailers handled off-rail to ground or truck, or onto rail, was 132 per day (10 U.S. Mail, 33 perishable produce, 89 general freight).

19. In 1984, total railroad traffic revenues of B&O and affiliated CSR from the Wilsmere Facility, for both ramp-to-ramp and door-to-door deliveries, totalled $11,235,842, or $37,452 per day (based on a 300 day rail year) with an average of $282.70 per trailer load based on 39,745 total units, on all contents mix, in and out, all directions. Such revenues are/were subject to reduction for drayage costs (to CMX), operator costs (to Kane), taxes, utilities and other operating costs.

20. B&O has contracted with an independent truck terminal operator, Kane Transfer Company of Baltimore, Maryland ("Kane"), to handle the daily in and out operations of the Wilsmere Facility, and Kane's operational accountability is to me.

21. In 1983-84 Kane operated the Wilsmere TOFC Terminal under a contract calling for payment based upon a "per man hour" rate. In 1984-85, Kane operates under a new contract calling for a "per unit (trailer) handled" rate. Kane's 1984-85 contract rate to B&O is/was based upon an average handling time of 30 minutes per trailer unit.

22. Intermodal operations began at Wilsmere in October 1982. Until August 1984, when the telephone news was received from our Wilmington local counsel that the Delaware DNR

planned to file some suit, no complaints about noises from TOFC or any other rail operations at Wilsmere had been made to B&O by any governmental body. Private parties voiced general complaints only at the town/county open meetings set up as part of the zoning process in 1983.

23. Area TOFC competition is offered by Consolidated Railroad Corporation ("Conrail") at Morrisville, New Jersey.

24. Other direct and indirect transportation competition arises from interstate truck lines, which are numerous, and air freight companies, which are also numerous, in the Wilmington area.

25. Other nearby B&O TOFC facilities include only Philadelphia to the north, and Baltimore to the south. If Wilsmere is shut down, the Philadelphia Fcility is physically incapable of handling any resultant, additional traffic, and use of the Baltimore Facility would not be feasible because of the non-competitive additional costs of drayage to and from northeastern markets in and out of Baltimore.

26. The delays in transportation generated by diversion to a smaller Facility, or the adjustment of B&O's intermodal transportation rates to include such added drayage costs, would result in a permanent shift of substantial intermodal traffic to other rail-truck intermodal routes or to other directly or indirectly competitive air or truck routes by the shippers, all at substantial and irreparable revenue loss to B&O as well as to the terminal operator and the drayage operators.

27. The long and narrow configuration of most of the Wilsmere Yard makes this Facility ideal for TOFC operations; however, it severely restricts the amount and location of space available for the temporary parking and storage of trailers awaiting rail or truck transfer. The location of the B&O tracks, and the permanent sidings for the loading and unloading of freight at the General Motors plant on the south side of the Wilsmere Facility, limit such storage and parking of trailers to the north side of the Facility and to the adjacent "Market Place" Parcel (see diagram attached as "Giles Exhibit A").

28. Based upon the Affidavit of B&O's hired environmental expert, Grant S. Anderson, which I have reviewed, and upon

analysis of the three phase compliance or "noise attenuation" program therein (A. cover the refrigerated trailers with certain shrouds or "ready made enclosures", which are yet to be designed and manufactured; B. erect a sound barrier or wall 20 feet or more in height; C. relocate the refrigerated trailers to a point 200 to 600 feet from the receptor measurement point, being the property line or the "M-2" or "M-1" zoning boundary line), the Wilsmere Facility would be forced to shut down completely if such compliance were required.

29. The reasons for such shutdown are as follows:

(A) There is not 600 feet width available for such relocation in the Facility, either in Elsmere from duPont Boulevard to Derrickson Run and from Derrickson Run to Little Mill Creek, or in New Castle County from Little Mill Creek to the southwest edge of Biden Park, and relocation to such a 600 foot distance from the northwest line of the "Market Place Property" would leave an available strip of only 120 feet wide and 480 feet long along Centerville road, capable of holding only about 40 trailers. The *average* daily number of trailers on the ground (2 A.M. report) is 182; peaks run 350-400. Even with only a 200' limit, the number of trailer spots in the Market Place property would be limited to 200 and the east end of the Elsmere portion limited to 200. However, projected track expansions in Elsmere and New Castle would eliminate nearly all of Elsmere spots.

(B) Aside from any engineering, aesthetic, zoning or permit limits, the amortized cost to build a 20-foot sound barrier and supports ($1.2 million), with no guarantee of compliance thereby, added to the CSR Wilsmere TOFC rates would price the Facility out of competition. The rough cost estimate of a 40-foot barrier ($4.8 million, or 4 times as much) is also prohibitive.

(C) Based upon the daily peak number (120) of refrigerated trailer units handled at Wilsmere, B&O or Kane would need to acquire at least 183 of the "shrouds" at a (theoretical) cost of $900-1,400 each, a cost to be added to

B&O trailer unit cost by Kane. Assuming the correctness of Mr. Anderson's estimate of 10 minutes to mount and 10 minutes to remove the "shrouds", utilizing a 3 person crew and small crane and truck for each, B&O or Kane would need ten (10) such crews, cranes and trucks, during the daily seasonal peak (March - April - May) to unload trains consisting of 120 refrigerated trailers on flatbed railcars in a reasonable 2 hour period. Utilizing only one such crew would require twenty (20) hours merely to unload such *peak* trains. Any load or unload time in excess of two (2) hours imperils the efficiency of subsequent train routing, switching, etc. Utilizing merely the daily *average* of refrigerated cars handled (33) a single such crew would require 5.5 hours to unload and load. However, since such trains come in six days per week, at any hour of the day or night, three (3) such crews would be required per day, one for each shift, or else the trailers would sit uncovered and running for 8-16 hours. The annual cost to rent one (1) crane and truck would be $41,460±. Only one crane and truck would be necessary if three (3) crews were spread over 3 shifts. However, for each additional crew on any shift, an additional crane and truck would be required. Based upon typical contractor crew costs ($9.00 per hour plus benefits), the annual cost of one (1) crew for all three (3) shifts would be $330,000.00±. Additional crews per shift would add $110,000± to such annual costs if necessary for a full year. We would estimate such need for the perishable products shipping season to be a bell-shaped curve, with a need for one (1) additional crew in October and June, two (2) crews per shift in November, three (3) to five (5) crews per shift in December, January, February and May, and as many as ten (10) crews per shift in March and April. Such estimated additional costs would be $9,200.00 per crew per shift, per month needed. Additional noise would itself be generated by the additional crane(s) and truck(s), required to place the sound shrouds on the trailers, but no cost has been developed to cure this. The additional annualized costs, including an amortization

of the cost of the shrouds, to B&O (directly or via an increase in Kane's contract unit cost to B&O) would be $10.00-$19.00 per trailer, based on the 1984 number of trailers handled above (39,745). Such unit costs, however, would be more dramatic if applied only to the refrigerated trailer traffic which generates them.

JOHN E. GILES

SUBSCRIBED AND SWORN to before me this 24th day of January, 1985.

NOTARY PUBLIC

My Commission expires:

EXHIBITS BEYOND EXHIBIT A OMITTED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

THE BALTIMORE and OHIO RAILROAD COMPANY, et al., *Plaintiffs*	)	C.A. NO. 84-452 WKS
v.	)	
CHARLES M. OBERLY, III, et al., *Defendants.*	)	

AFFIDAVIT OF CHARLES W. WILKINS, III

Charles W. Wilkins, III, being duly sworn, deposes and says:

1. He was graduated from the University of Delaware in 1948 with a Bachelor of Electronic Engineering degree. In conjunction with an EPA noise program, he attended Noise Control Training in 1980 at the University of West Virginia and the University of Maryland. This training covered four areas: techniques of noise measurement, equipment available for the measurement of noise, recommended noise control regulations, and principles of noise abatement.

2. Following his graduation from the University of Delaware, Mr. Wilkins began working for Pratt and Whitney Aircraft/United Aircraft located in East Hartford, Connecticut in 1948. His position at Pratt & Whitney was as an experimental test engineer. In that capacity he also worked as a noise consultant in which he tested jet engines and developed a means of controlling engine noise.

3. In 1955 he was employed by the Industrial Division of Honeywell, Inc. in Philadelphia. There he was the market manager for scientific instruments. In this capacity he guided the development, manufacture, and sale of scientific instruments.

4. In 1980 he came to work for the State of Delaware at the Department of Natural Resources and Environmental Control, as the individual responsible for the development and implementation of Delaware's Noise Control regulations. He is an environmental engineer with the State and performs a number of duties in this capacity. One of these duties was the development of Delaware's noise regulations, referred to in the Stipulated Factual Memorandum at II. B. 2 at page 8.

5. The development of Delaware's noise regulations was accomplished under an EPA program to assist states in promulgating noise standards consistent with federal law. Mr. Wilkins' development of Delaware's current noise regulations was accomplished in conjunction with the EPA, with the particular assistance of an EPA official named Patrick Anderson. In addition, a Noise Advisory Subcommittee, comprised of individuals representing industry and local government participated in development of the regulations which were promulgated by Secretary Wilson. Attached as Exhibit A is a list of the members of the Noise Advisory Subcommittee.

6. In 1980 he collaborated with Quest Instruments to develop sound level measuring instruments for motor vehicle noise emissions. These efforts culminated in the production of a device which is now used in the motor vehicle inspection lanes operated by the Delaware Department of Transportation. Mr. Wilkins has assisted local governments in developing their noise emission regulations. He has lectured to state police officers and liquor control commission agents concerning noise emission testing equipment and has trained such groups in the use of this equipment. Moreover, Mr. Wilkins is responsible for the maintenance and calibration of the State's noise testing equipment.

7. Periodically during May and June, 1984, Mr. Wilkins visited the vicinity of the Wilsmere Intermodal Facility to conduct noise testing. To perform the measurements he used several instruments: a Soltect recorder model 6723, serial #B14369; General Radio sound level meter model 1988, serial #4121; 1560-P42 pre-amplifier, serial #4605 (set at X1); 1962-9610 microphone, serial #12552; and a General Radio Minical Calibrator model 1987, serial #0394. For each measurement Mr. Wilkins

centered his equipment with respect to the railroad. He also calibrated the instruments before and after each test in accordance with procedures accepted by EPA. The purpose of calibration is to make sure that the instrument is working accurately. Each calibration for every test disclosed that the equipment was functioning properly.

8. Under the Delaware Noise regulations, to determine whether there is a violation, it is necessary to obtain readings of the area background noise level without the additional noise contribution of the specific source being tested (the "ambient noise"), as well as of the noise level when the noise emitted by the source is added to the ambient level.

9. The regulation which pertains to Leq measurements, specifically, Table 1 in Section 6.01, contains a misleading form of nomenclature. The title of Table 1 is "Sound Levels by Receiving Land Use Zone, Leq (24) dBA". The indication of "24" as the number of hours to be averaged only applies to the first two categories on the chart, specifically Receptors C and B, industrial and commercial uses, respectively. Receptor A is plainly marked to be used in averaging over specific periods of time throughout a given day, because the "A" class applies to residential areas. The obvious reason for distinguishing the time periods as marked, is to allow for lesser noise in the nighttime hours, so people can sleep without disruption from excessive noise.

10. Mr. Wilkins attempted to obtain an ambient noise level reading at several locations in residential neighborhoods in the vicinity of the Chessie yard on May 14, 17, 25 and 31, but failed because the noise emitted by refrigerator units at the Wilsmere Intermodal Facility drowned out all other noise sources.

11. On May 14, 1984, Mr. Wilkins took noise emission readings from locations #2, #5 and #7. Attached as Exhibit B is a map of the Elsmere area on which these locations are marked. Location #2 is the testing site which was closest to the noise source at that time; it is sited in front of the Wilson residence at 500 Woodward Avenue. Employees of Bolt, Beranek and Newman ("BNN") were present when these readings were made. This was the only occasion on which BBN representatives were

present during Mr. Wilkins' testing. The emissions from the refrigeration units averaged 78-79dBA for this period for all locations. Mr. Wilkins equates this level to the noise one would hear standing next to a highway as a stream of trucks passed in incessant review. It is a continuous rumble.

12. On May 17, 1984, Mr. Wilkins again obtained an average noise emission reading on refrigeration units in the Wilsmere Intermodal Facility. The reading on this date was taken during the daytime from location #2. Refrigeration unit noise emissions averaged 79dBA on this occasion.

13. Mr. Wilkins obtained an average 78dBA noise emission reading from the refrigeration units on May 25, 1984. He took this reading from location #2 between 10:45 and 10:50 a.m.

14. On June 8, 1984, at between 10:45 and 11:00 a.m., Mr. Wilkins succeeded in obtaining an ambient noise level reading at location #2. On this occasion, the refrigeration units nearest location #2 were not operating. Other units and machinery on the Wilsmere facility were operating and any noise generated by such equipment was included in the ambient noise level reading of 52dBA.

15. In Mr. Wilkins' opinion, these tests show that, at the time and place of the reading, the most significant noise emissions from the Wilsmere yard were caused by the refrigeration units and not by rail cars or locomotives.

16. Paragraph 6.02 of the Delaware regulations prohibits any source from emitting a sound level more than 10dBA above the ambient level measured at the point of complaint origination. The ambient level is obtained by taking the reading when the sound source or sources, are turned off. The readings obtained by Mr. Wilkins demonstrate that shutting off just one sound source from the Wilsmere Facility, the refrigeration units, resulted in a difference in the sound level of 26-27dBA. Since the factors which are measured as part of the ambient noise level will be very nearly identical on any given day, the selection of any one day to measure ambient noise will not result in a significantly different ambient noise level reading than any other day at a particular location.

17. In taking readings from this particular source, Mr. Wilkins used the Soltec graphic recorder. This device records all noise and graphically reflects, on chart paper, extraneous noises as sharp peaks. Readings are taken to ascertain the level of particular noises as well as the average noise in a particular area, over a given period of time. These values are calculated by analyzing the values on the graph, including any peaks. Certain peaks, which represent extraneous noises such as a car door slamming or an airplane flying overhead, are not included in the averaging process. Through this process, only relevant noise is measured.

18. The Delaware regulations and, most specifically, their established method of noise emission measurement are consistent with accepted engineering principles concerning noise emission and measurement.

19. All of the measurements recorded by Mr. Wilkins in the vicinity of the Wilsmere yard were taken for the purpose of ascertaining the intensity of the noise in the area. The secondary purpose was to discuss these noise levels with Chessie representatives, in anticipation of working with those individuals towards abatement and control of the noise.

20. Mr. Wilkins does not have the authority to independently commence enforcement actions. If he determines that a particular source of noise may be in violation of the Act and regulations, he first discusses the matter with the owner of the source, in hopes of working with that person towards abatement. If this approach is not practicable, Mr. Wilkins first refers the matter to the appropriate police department for enforcement action. Only when the police do not take action, would a case be referred to the Department of Justice, through the legal office of DNREC for enforcement action.

21. Prior to the commencement of this litigation, Mr. Wilkins, with the assistance of a diesel specialty company, worked towards successful reduction of noise generated by the cranes in the Wilsmere yard. At the time this civil action was commenced, he was planning to continue his investigation into

the other sources of noise in the yard, in hopes of achieving reduction of noise levels with the cooperation of Chessie representatives.

22. On August 14, 1984, Mr. Wilkins went to the vicinity of the Wilsmere yard for the purpose of taking photographs. Attached as Exhibit C is a photograph of the yard taken from the Route 141 bridge facing east. The photograph accurately depicts the scene in the yard, as he viewed it that day. Attached as Exhibit D, is a photograph of the area which was formerly the parking lot of a drive-in movie theatre, and was then being filled and graded for use as a parking lot for trailers. The photograph was also taken from the Route 141 bridge, facing north-east, and accurately depicts the scene as he viewed it that day.

23. On January 22, 1985, Mr. Wilkins returned to the vicinity of the Wilsmere yard for the purpose of taking additional photographs. Attached as Exhibit E is a photograph taken from the same location as the photograph attached as Exhibit C and it accurately depicts the scene as he saw it that day. Attached as Exhibit F, which is another photograph taken on January 22, 1985. It was taken from the same location as the photograph attached as Exhibit D, and accurately depicts the scene as he viewed it that day.

24. On January 28, 1985, Mr. Wilkins took several aerial photographs from a helicopter flying over the Wilsmere yard. Attached as Exhibit G is one such photograph which shows a view of the entire yard. Attached as Exhibit H is another photograph taken on January 28, 1985 which shows an aerial view of the parking lot, which is shown in the photographs attached as Exhibits D and F. The photographs attached as Exhibits G and H accurately depict the scenes as Mr. Wilkins viewed them on the day they were taken.

_____

Charles W. Wilkins, III

Subscribed and sworn to before me this 30th day of January, 1985.

_____

Notary Public

NOISE ADVISORY SUBCOMMITTEE

Michael C. Ferguson
City Planner
800 French Street — 8-1-571-4659
Wilmington, Delaware 19801

Leon de Valenger, Jr.
Director
League of Local Governments
P.O. Box 484 — 678-0991
Dover, Delaware 19901 — Mary Molek, Asst. Dir.
Judy Goldsmith, Sect.

Donald Witmer, Engineer
436 CES/DEEV
Dover Air Force Base — 678-6351
Dover, Delaware 19901

Terry Dear, Senior Consultant
Occupational Environmental Control
Engineering Department
E. I. duPont de Nemours & Company, Inc.
1382 Louviers Building — 8-1-366-3655
Wilmington, Delaware 19898

Paul R. Stoffer
Manager, Employee Benefits
Administration
ICI Americas, Inc. — 8-1-575-3246
Wilmington, Delaware 19897

Grover A. Biddle
Delaware Development Office
Townsend Building — 678-1506
Dover, Delaware 19901

Exhibit A

Supreme Court, U.S.
FILED
MAY 30 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1773

In The

Supreme Court of the United States

October Term, 1985

CHARLES OBERLY, III and JOHN E. WILSON, III

Appellants,

v.

THE BALTIMORE & OHIO RAILROAD COMPANY, et al,

Appellees.

ON APPEAL FROM U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT

APPELLEES' MOTION TO AFFIRM

DUANE, MORRIS & HECKSCHER
WILLIAM E. MANNING
ALICE W. BECK

1220 Market Building
Suite 7000
Wilmington, DE 19899
(302) 571-5556

Counsel for Appellees

DATED: May 28, 1986

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

QUESTION PRESENTED

Do regulations promulgated by the Environmental Protection Agency ("EPA") pursuant to the Noise Control Act of 1972, 42 U.S.C. § 4901 *et seq.* (1972) concerning railroad noise emission standards, preempt the enforcement of the State of Delaware's ("Delaware") regulations issued pursuant to its legislation where both the EPA's and Delaware's regulations regulate the level of noise emissions at railyards, but regulate them by different methods?

PARTIES TO PROCEEDINGS BELOW

For the information required by Supreme Court Rule 28.1, the Corporate Appellees refer the Court to Appellants' Appendix to Jurisdictional Statement pp. A-53 - A-54 ("Appellants' Appendix p. —").

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO PROCEEDINGS BELOW	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
APPELLEES' MOTION TO AFFIRM	1
SUMMARY OF ARGUMENT	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF FACTS	4
ARGUMENT	9
I. The Decision of the Lower Courts Is Correct.	10
II. The Decision of the Lower Courts Poses No "Threat to Federalism."	12
III. There Is No "Discord" Among the Lower Federal Courts Over the Application of Preemptive Principles.	14
CONCLUSION	15
APPENDIX	App. 1

TABLE OF AUTHORITIES

Page

CASES

Arkansas Electric Co-op. Corp. v. Arkansas Public Service Commission, 461 U.S. 375 (1983) 11, 15

Association of American Railroads v. Costle, 562 F.2d 1310 (1977) 5, 6, 7, 9, 13

B&O Railroad v. Oberly, 606 F.Supp. 1340 (D.Del. 1985) 13

Brown v. Hotel and Restaurant Employees and Bartenders, 104 S.Ct. 3179 (1984) 10

Capital Cities Cable, Inc. v. Crisp, 104 S.Ct. 2694 (1984) 13

Marshall v. Burlington Northern, Inc., 720 F.2d 1149 (9th Cir. 1983) 14

NLRB v. Nash-Finch Co., 404 U.S. 138 (1971) 13

Ray v. Atlantic Richfield Co., 435 U.S. 151 (1977) 11, 15

STATUTES

7 *Del. C.*, Ch. 71, §§7102-7125 (1982) 2

42 U.S.C. § 4901 *et seq.* (1972) 2

42 U.S.C. § 4901(a) 2

42 U.S.C. § 4901(a)(3) 11

42 U.S.C. § 4916 2

42 U.S.C. § 4916(a)(1) 3, 5

42 U.S.C. § 4916(c) 3

42 U.S.C. § 4916(c)(1) 3, 5, 10

42 U.S.C. § 4916(c)(2) 4, 5, 12

45 U.S.C. § 23 (1976) 14

45 U.S.C. § 434 (1976) 14

TABLE OF AUTHORITIES—Continued

Page

OTHER AUTHORITIES

39 Fed. Reg. 24580 (1974) 5
44 Fed. Reg. 22960-22972 (1979) 6
45 Fed. Reg. 1252 (1980) 7
45 Fed. Reg. 1256 (1980) 9
45 Fed. Reg. 1258 (1980) 6
47 Fed. Reg. 54106 (1982) 8

No. 85-1773

In The

Supreme Court of the United States

October Term, 1985

CHARLES OBERLY, III and JOHN E. WILSON, III

Appellants,

v.

THE BALTIMORE & OHIO RAILROAD COMPANY, et al,

Appellees.

ON APPEAL FROM U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT

APPELLEES' MOTION TO AFFIRM

Pursuant to Rule 16.1, the Appellees move to affirm the judgment of the Court of Appeals for the Third Circuit on the grounds that the lower courts properly found that the federal regulations preempt the State of Delaware's regulations and the questions on which the decision of the cause depends are so insubstantial as not to need further argument.

SUMMARY OF ARGUMENT

This case involves a difference of opinion between federal and state regulators concerning how best to regulate noise from railroad equipment and facilities. This difference of opinion resulted in conflicting standards for such noise emissions. The District and Circuit Courts, applying well-settled preemption principles, properly found under these circumstances that Congress in enacting the Noise Control Act of 1972, 42 U.S.C. § 4916 *et seq.*, intended to preempt state and local regulations. Furthermore, contrary to Appellants' assertions, there is no disagreement among the several Circuits over the application of those principles.

STATUTORY PROVISIONS INVOLVED

This action involves the relationship between a federal statute, the Noise Control Act of 1972 ("the Act"), 42 U.S.C. § 4901 *et seq.* (1972), and regulations promulgated thereunder, and a Delaware statute, the Delaware Noise Control and Abatement Act, 7 *Del. C.*, Ch. 71, §§ 7102-7125 (1982) ("the Delaware Act"), and regulations promulgated thereunder. Relevant portions of the Act provide:

§ 4901. Congressional findings and statement of policy

(a) The Congress finds—

(1) that inadequately controlled noise presents a growing danger to the health and welfare of the Nation's population, particularly in urban areas;

(2) that the major sources of noise include transportation vehicles and equipment, machinery, appliances, and other products in commerce; and

(3) that, while primary responsibility for control of noise rests with State and local governments, Federal action is essential to deal with major noise sources in commerce control of which requires national uniformity of treatment.

(b) The Congress declares that it is the policy of the United States to promote an environment for all Americans free from noise that jeopardizes their health or welfare. To that end, it is the purpose of this chapter to establish a means for effective coordination of Federal research and activities in noise control, to authorize the establishment of Federal noise emission standards for products distributed in commerce, and to provide information to the public respecting the noise emission and noise reduction characteristics of such products.

§ 4916. Railroad noise emission standards

(a) Regulations; standards; consultation with Secretary of Transportation

(1) Within nine months after October 27, 1972, the Administrator shall publish proposed noise emission regulations for surface carriers engaged in interstate commerce by railroad. Such proposed regulations shall include noise emission standards setting such limits on noise emissions resulting from operation of the equipment and facilities of surface carriers engaged in interstate commerce by railroad which reflect the degree of noise reduction achievable through the application of the best available technology, taking into account the cost of compliance. These regulations shall be in addition to any regulations that may be proposed under section 4905 of this title.

• • •

(c) State and local standards and controls

(1) Subject to paragraph (2) but notwithstanding any other provision of this chapter, after the

> effective date of a regulation under this section applicable to noise emissions resulting from the operation of any equipment or facility of a surface carrier engaged in interstate commerce by railroad, no State or political subdivision thereof may adopt or enforce any standard applicable to noise emissions resulting from the operation of the same equipment or facility of such carrier unless such standard is identical to a standard applicable to noise emissions resulting from such operation prescribed by any regulation under this section.
>
> (2) Nothing in this section shall diminish or enhance the rights of any State or political subdivision thereof to establish and enforce standards or controls on levels of environmental noise, or to control license, regulate, or restrict the use, operation, or movement of any product if the Administrator, after consultation with the Secretary of Transportation, determines that such standard, control, license, regulation, or restriction is necessitated by special local conditions and is not in conflict with regulations promulgated under this section.

The Delaware Act is found in Appellants' Appendix pp. A-25 - A-38.

STATEMENT OF FACTS

Appellees accept the portion of Appellants' factual summary entitled "The Chessie Group's Operation," Appellants' Jurisdictional Statement pp. 3-4 ("AJS p. —"). We also agree that a summary of the history of the competing federal and state regulations is important and helpful to the Court. Appellees disagree, however, with portions of Appellants' summary of relevant "Regu-

latory History," AJS pp. 4-7, and therefore, offer our own such summary.

The Act directs the EPA to regulate "noise emissions resulting from operation of the equipment and facilities of surface carriers engaged in interstate commerce by railroad." 42 U.S.C. § 4916(a) (1). The Act further provides that after the EPA promulgates regulations applicable to noise emissions resulting from the operation of railroad equipment and facilities, no state may adopt or enforce any different standard. 42 U.S.C. § 4916(c) (1). However, the Act invites a state with special local problems not addressed by the EPA regulations to apply to the EPA for permission to establish and enforce regulations dealing with the special problems. 42 U.S.C. § 4916(c) (2).

On July 3, 1974, the EPA issued a notice of proposed rulemaking in which the agency announced its intention to regulate noise emitted by rail cars and locomotives. It decided not to impose standards for other railroad equipment or facilities because it believed that noise from other equipment and facilities was best controlled by state and local regulation. However, the EPA stressed that if in the future it appeared that a different approach would be better, it would alter its regulations accordingly. 39 Fed. Reg. 24580 (1974).

Prior to promulgation of the final regulations, the Association of American Railroads ("AAR") instituted an action against the EPA, *AAR v. Costle*, 562 F.2d 1310 (1977), arguing that the Act required the EPA to regulate *all* equipment and facilities and not just rail cars and locomotives. The United States Court of Appeals for the Dis-

trict of Columbia agreed with the AAR and directed the EPA to promulgate regulations dealing with all railroad equipment and facilities. *Id.* at 1322.

Pursuant to the court order, the EPA issued a notice of proposed rulemaking on April 17, 1979. 44 Fed. Reg. 22960-22972 (1979). Included among the newly proposed regulations were standards for refrigerated trailers and containers as well as property line standards limiting the cumulative noise emitted from a railyard.

However, after reviewing comments received from various sources, the EPA chose a regulatory method different from that embraced in its proposed regulations. Instead, it decided to regulate four major sources of railyard noise and explicitly rejected specific standards for refrigerated cars and trailers:

> *Numerous respondents suggested solutions to the noise problems created by parked refrigerator cars,* among which were the use of disconnects from the diesel generator system and a reconnect to an electrical AC line source, and relocating these cars away from boundary lines adjoining residential and commercial areas when their refrigeration equipment is in operation.
>
> *EPA has decided not to promulgate a source standard for refrigerator cars at this time, in part to allow time to evaluate the effect of their declining use.*

45 Fed. Reg. 1258 (1980) (Emphasis added).

In the Status Report of November 12, 1981, filed by the parties to the *Costle* litigation with the court, the EPA stated that it was withdrawing its proposals for property

line standards because its preferred method of regulating major noise sources is sufficient to regulate noise emissions from rail facilities and thus the property line standards are unnecessary:

> Respondents [EPA] believe that the cumulative effect of these standards [the final standards for specific sources of railroad noise, 45 Fed. Reg. 1252 (1980)], which were based on the noise abatement achievable through application of the best available technology taking into consideration the cost of compliance, effectively regulate both rail equipment and rail facilities. The standards promulgated to date cover the major sources of noise from railroad equipment which in turn generate a large proportion of the noise emissions from rail facilities. *Since the cumulative effect of regulating equipment, used within railyards is also to regulate to a significant degree noise emissions from rail facilities, the parties agree that it is unnecessary for EPA to establish further property line facility emission standards specifically for railyards. In consideration of these facts, EPA intends to withdraw its proposal to promulgate a property line standard for rail facilities.* [EPA] agrees with petitioner, AAR, that EPA has already effectively regulated railroad "equipment and facilities" in a manner "consistent" with the customary usage of the phrase in the railroad industry, 562 F.2d at 1321, and in a manner consistent with the criteria contained in § 17 of the Noise Control Act, and that national uniformity of treatment is effectively assured as the Federal standards become effective.

Status Report, *AAR v. Costle,* No. 76-1353 (D.C. Cir. Nov. 12, 1981) Appellants' Appendix p. A-77 (emphasis added).

On December 1, 1982, the EPA published its decision rejecting property line standards because it deemed them unnecessary:

> The standards promulgated to date cover the major sources of noise from railroad equipment which in turn generate a larger proportion of the noise emissions from rail facilities. Since those standards addressed the major sources of noise from railroad operations, and since the cumulative effect of regulating equipment used within railyards is also to regulate to a significant degree, noise emissions from rail facilities, it was agreed by the AAR, the State of Illinois and the EPA that it is unnecessary for EPA to establish further property line facility emission standards.
>
> *In view of the foregoing, EPA concludes that it has satisfied its statutory requirements, under § 17 of the Noise Control Act of 1972, to promulgate noise standards for railroad equipment and facilities and that the proposed standards are unnecessary.* Accordingly, this notice withdraws the proposed property line and refrigerator car noise emission standards.

47 Fed. Reg. 54106 (1982) (emphasis added).

Delaware, pursuant to the Delaware Act, promulgated regulations on January 20, 1982, without the permission of the EPA, which purport to regulate noise emitted from railyards by setting property line standards—i.e. standards which regulate noise levels at the boundary between the noise generator's property and its neighbor's.

The Appellants attempted to enforce the Delaware Act and its regulations at the Appellees' facility in Wilmington, Delaware by implementing a property line standard. Appellants' chief concern was the noise emitted from refrigerated units at such facilities. Affidavit of Charles Wilkins, III, ¶ 15, Appellants' Appendix p. A-94.

In their Jurisdictional Statement, Appellants attempt to characterize the EPA's withdrawal of these proposed regulations as being motivated by a desire to "buy out of a lawsuit[,]" rather than an interest in fair and effective regulation. AJS p. 12. By tilting at a windmill which is not a party to this case,[1] Appellants raise the spectre of a regulatory agency overcome by the litigative might of the regulated industry. Appellees pause at this rather reckless assertion only to point out that: (1) the EPA reviewed and analyzed comments of several parties other than the AAR before concluding that its proposed regulations were unnecessary, 45 Fed. Reg. 1256 (1980); (2) there is nothing in the record even suggesting that the EPA did not promulgate the proposed regulations as the result of a threat of continued litigation; and (3) there is no logical explanation of why the EPA might have feared review by the *Costle* court of its proposed regulations. After all, the proposed regulations were consistent with the court's command to engage in more, rather than less, regulation and there is nothing in the *Costle* opinion which foreshadows anything other than judicial approval of the proposed regulations.

———o———

ARGUMENT

This case involves nothing more than a difference of opinion between state and federal regulators over the

---

[1] The EPA is not a party to this lawsuit. It did, however, file a Memorandum of Law at the request of the Circuit Court which fully confirmed the views of the District Court on the preemption issue. Appellees' Appendix to Motion to Affirm App. 1 ("App. —").

method for controlling railroad noise. Understood as such, the scope of the preemptive blanket given by Congress to the method of regulation chosen by the EPA makes sense and does not pose a rampant threat to "Federalism" or "Republicanism," as the Appellants would have it. Nor does this case involve an issue as to which the courts of the several circuits are in hopeless discord.

I. The Decision Of The Lower Courts Is Correct.

All parties agree that when presented with a claim that a federal statute preempts state or local attempts at regulation, courts must examine the intent of Congress in enacting the federal statute in question. *Brown v. Hotel and Restaurant Employees and Bartenders,* 104 S.Ct. 3179 (1984). Moreover, Appellants concede that Congress intended to give complete preemptive effect to regulations promulgated by the EPA pursuant to the Act. Congress expressly stated that:

> After the effective date of a regulation under this section applicable to noise emissions resulting from the operation of any equipment or facility of a surface carrier engaged in interstate commerce by railroad, no State or political subdivision thereof may adopt or enforce any standard applicable to noise emissions resulting from the operation of the same equipment or facility of such carrier unless such standard is identical to a standard applicable to noise emissions resulting from such operations prescribed by any regulation under this section.

42 U.S.C. § 4916(c)(1). Finally, there is an undisputed record that, in the EPA's view, the EPA has regulated

noise emissions from all railroad equipment and facilities as directed by the *Costle* court.[2]

However, the Appellants part company with Appellees, the EPA and the lower courts by asserting that the EPA's selection of a regulatory method—i.e. its decision to regulate railroad facilities by imposing standards for major noise producing elements within such facilities rather than imposing property line standards like Delaware's —leaves the State with authority to adopt any regulatory method not adopted by the EPA, including those methods which were considered and rejected.

Such a proposition renders the preemptive provisions of the Act meaningless and seriously frustrates the stated Congressional objective of nationally uniform regulation. 42 U.S.C. § 4901(a)(3). In avoiding such a result, the lower courts were guided by a well-settled principle previously articulated by the Court:

> [A] federal decision to forego regulation in a given area may imply an authoritative federal determination that the area is best left unregulated, and in that event would have as much preemptive force as a decision to regulate.

Arkansas Elec. Co-op. v. Arkansas Public Service Commission, 461 U.S. 375 (1983); *Ray v. Atlantic Richfield Co.,* 435 U.S. 151, 178 (1977).

In this case the lower courts simply recognized the preemptive effect of an authoritative decision by the responsible federal agency that a certain method of regula-

---

[2] As the EPA confirmed in its brief, "under the literal language of section 17(c)(1) [42 U.S.C. § 4916(c)(1)] it appears that any state regulation of railroad facilities, including Delaware's property-line standard, is preempted." App. 9 (footnote omitted).

tion was unnecessary inasmuch as existing federal standards effectively regulated noise emissions from railroad equipment and facilities. Thus, while the Appellants apparently quarrel with the EPA over the adequacy of the chosen regulatory method, Appellants do not have a sound basis for challenging the lower courts' decision to recognize Congress' intent to preempt state regulation.

II. The Decision Of The Lower Courts Pose No "Threat To Federalism."

Appellants suggest that the lower courts have indiscriminately given preemptive effect to a federal determination not to regulate and that, absent corrective guidance by this Court, state regulators will be "stymied in their efforts to address a problem of state interest." AJS p. 12.

Appellants' sense of alarm over this "threat to federalism" is particularly unwarranted in this case. Although Congress' primary objective in passing the Act was to protect citizens from excessive noise through a nationally uniform set of regulations, it was nevertheless solicitous of individual state's enforcement concerns. The Act provides:

> Nothing in this section shall diminish or enhance the rights of any State or political subdivision thereof to establish and enforce standards or controls on the levels of environmental noise, or to control, license, regulate or restrict the use, operation or movement of any product if the Administrator, after consultation with the Secretary of Transportation, determines that such standard, control, license, regulation, or restriction is necessitated by special local conditions and is not in conflict with regulations promulgated under this section.

42 U.S.C. § 4916(c)(2).

This open invitation for states which judge the federal standards to be inadequate in light of special local

conditions to craft, as part of a cooperative federal/state effort, supplementary regulation which exemplifies, rather than threatens, federalism. As noted by the District Court, Delaware has never taken up this Congressional invitation, *B&O Railroad v. Oberly,* 606 F.Supp. 1340, 1348 n. 6 (D.Del. 1985), and the Appellants have never explained her failure to do so. Delaware has not been "stymied" in her efforts to protect her citizens against excessive noice from the Appellees' railroad facility, except, perhaps, by her own failure to seek relief plainly offered to it under the Act.

Appellants also misunderstand or ignore the clear Congressional intent behind the Act in asserting, as a general proposition, that before the preemptive effect of a federal decision to forego regulation can be judicially recognized, the court must identify "an agency's affirmative determination that state regulation is not in the public interest." AJS p.11. Appellants forget that it is Congress' intent, not the EPA's, that matters.[3] In fact, the court in *AAR v. Costle* chided the EPA for presuming that it had the authority to ignore a clear congressional command. 562 F.2d at 1311.

---

[3] Appellants cite *Capital Cities Cable, Inc. v. Crisp,* 104 S.Ct. 2694 (1984) as "requiring" evidence of an affirmative determination by the agency that the state regulation would be contrary to public interest. That may be true, where, as in *Capital Cities,* the federal scheme left to the relevant agency the authority to determine the scope of federal preemption. In this case, however, the Act makes clear that Congress, and not the EPA, made the determination to preempt state and local regulation. Appellants reliance on *NLRB v. Nash-Finch Co.,* 404 U.S. 138 (1971) is similarly misplaced and any difference between that case and the case at bar can be attributed to the particular federal acts in question.

III. There Is No "Discord" Among The Lower Federal Courts Over The Application Of Preemptive Principles.

The Appellants' Jurisdictional Statement reveals two things. First, Appellants clearly understand the need to demonstrate, in order to gain plenary review, that this case involves important questions of federal law as to which the lower federal courts are in disagreement. Second, Appellants are unable to identify such "discord" among the lower federal courts.

As best we understand the argument, Appellants claim that some federal courts blindly provide preemptive protection to federal decisions to forego regulations—the "per se" application—while others employ a "case-specific analysis" to claims of preemption. AJS pp. 11-14. The cases upon which Appellants rely, including the instant case, display no such judicial schizophrenia. Instead, they demonstrate that federal courts consistently look to the fundamental criterion of Congressional intent in determining whether state regulation has been preempted.

For example, in *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149 (9th Cir. 1983), the 9th Circuit Court of Appeals compared the Federal Railroad Safety Act of 1970, 45 U.S.C. § 434 (1976), with the Boiler Inspection Act of 1911, 45 U.S.C. § 23 (1976), and concluded, with respect to the former, that Congress had intended no preemption in the absence of a federal action concerning the same subject matter as was affected by competing State regulation. With respect to the latter, the Court concluded that Congress had intended to displace all state regulation regardless of whether federal regulatory authority had actually been exercised. *Id.* at 1152-53. The *Marshall* court applied no "per se" test. Indeed, the case stands

as testimony that at least the 9th Circuit Court of Appeals well understands that there is, and can be, no "per se" application of the principle articulated in *Arkansas Elec. Co-Op Corp. v. Arkansas Public Service Commission,* and *Ray v. Atlantic Richfield*—i.e., that a considered federal agency decision not to exercise federal regulatory authority may, *in some cases,* be equally as preemptive as a decision to exercise such regulatory authority.

None of the other cases cited by Appellants suggest there exists any misunderstanding of appropriate preemption analysis among the lower courts. A reading of these cases indicates only one thing in this regard—federal courts understand that, depending upon their interpretation of Congress' intentions, State or local attempts at regulation *may* or *may not* be preempted.

———o———

CONCLUSION

The lower courts properly determined that the EPA's carefully considered judgment not to impose property line standards or standards specifically for refrigeration units is precisely the exercise of federal regulatory authority under the Act that Congress intended to protect by raising a preemptive shield. Because the lower ocurts applied well settled legal principles in this case, there is

no reason for the Court to receive further briefing or argument and the case should be summarily affirmed.

Respectfully submitted,

DUANE, MORRIS & HECKSCHER

BY /s/ WILLIAM E. MANNING
ALICE W. BECK

1220 Market Building
Suite 7000
Wilmington, DE 19899

Counsel for Appellees

DATED: May 28, 1986

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

THE BALTIMORE AND OHIO RAILROAD COMPANY, et al.,

Appellees,

CHARLES M. OBERLY, III and JOHN E. WILSON, III,

Appellants.

No. 85-5272

MEMORANDUM OF LAW OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

F. HENRY HABICHT II
Assistant Attorney General
Land and Natural Resources Division

LAWRENCE R. LIEBESMAN, Attorney
Environmental Defense Section
Land and Natural Resources Division
U.S. Department of Justice
P.O. Box 23986
Washington, D.C. 20026-3986
(202) 633-2281

OF COUNSEL:

FRANCIS S. BLAKE
General Counsel
U.S. Environmental Protective Agency
Washington, D.C. 20460

PETER H. WYCOFF
Acting Asosciate General Counsel
Air and Radiation Division
U.S. Environmental Protection Agency
Washington, D.C. 20460

GERALD GLEASON
Assistant General Counsel
Office of General Counsel (LE-132A)
U.S. Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

TABLE OF CONTENTS

Page

Introduction 1

I—IN ENACTING THE NOISE CONTROL ACT, CONGRESS EXPRESSLY PREEMPTED STATE REGULATION OF NOISE FROM RAILROAD EQUIPMENT AND FACILITIES REGULATED BY EPA 2

II—THE QUIET COMMUNITIES ACT OF 1978 DID NOT LESSEN THE BROAD PREEMPTIVE EFFECT OF SECTION 17 OF THE NOISE CONTROL ACT 7

Conclusion 9

App. 4

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

THE BALTIMORE AND OHIO RAILROAD COMPANY, et al.,

Appellees,

v.

CHARLES M. OBERLY, III and JOHN E. WILSON, III

Appellants.

No. 85-5272

MEMORANDUM OF LAW OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

(p. 1) Introduction

On October 18, 1985, the Court requested the views of the Environmental Protection Agency on the issue of whether the Delaware noise regulation at issue, purporting to establish a "property-line standard" applicable to railroad activities at the Wilshire, Delaware facility, has been preempted by the Noise Control Act (NCA) 42 U.S.C. § 4901. The specific preemption issue before the Court is whether the district court was correct in holding that section 17 of the Noise Control Act preempts the Delaware standard where EPA has adopted federal standards regulating noise from such facilities and, further has considered and then declined to prescribe a federal property-line standard for such facilities on the ground that it is unnecessary.[1]

---

[1] Section 17 reads in relevant part:

(c) State and local standards and controls

(1) Subject to paragraph (2) but notwithstanding any other provision of this chapter, after the effective date of a regulation under this section applicable to noise emissions, resulting from the operation of any equipment or facility of a surface carrier engaged in inter-

(Continued on following page)

(p. 2) For the reasons set forth herein, the Delaware standard appears to be preempted.

I

IN ENACTING THE NOISE CONTROL ACT, CONGRESS EXPRESSLY PREEMPTED STATE REGULATION OF NOISE FROM RAILROAD EQUIPMENT AND FACILITIES REGULATED BY EPA

The Supreme Court's test for preemption has been articulated in a number of recent opinions. Essentially, the Court has identified two situations in which federal law totally (p. 3) or partially preempts state law. First, "if Congress expressly indicates an intent to occupy a given field, any state law falling within that field is preempted." *Silkwood v. Kerr-McGee Corp.* 104 S. Ct. 615 (1984). Second, "if Congress has not entirely displaced state regulation over the matter in question, state law is still preempted to the extent it actually conflicts with

---

(Continued from previous page)

state commerce by railroad, no State or political subdivision thereof may adopt or enforce any standard applicable to noise emissions resulting from the operation of the same equipment or facility of such carrier unless such standard is identical to a standard applicable to noise emissions resulting from such operation prescribed by any regulation under this section.

(2) Nothing in this section shall diminish or enhance the rights of any State or political subdivision thereof to establish and enforce standards, or controls on levels of environmental noise, or to control, license, regulate, or restrict the use, operation, or movement of any product if the Administrator, after consultation with the Secretary of Transportation, determines that such standard, control, license, regulation, or restriction is necessitated by special local conditions and is not in conflict with regulations promulgated under this section.

federal law . . . or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Id; See also Fidelity Savings & Loan Association* v. *de la Cuesta,* 458 U.S. 141, 153 (1982), *Michigan Canners and Freezers Assoc.* v. *Agricultural Marketing and Bargaining Bd.,* 104 S. Ct. 2518 (1984), *Hillsborough County, Fla.* v. *Automated Medical Laboratories, Inc.,* 53 U.S.L.W. 4612 (June 3, 1985).

Under either test, section 17 of the NCA clearly preempts state regulation of noise from railroad equipment or facilities that EPA has regulated.[2] When Congress enacted the Noise Control Act in 1972, it set up a comprehensive regulatory scheme for major sources of noise emissions that expressly preempts state and local regulation to varying degrees in a variety of areas.[3] Central to this regulatory scheme was a declaration that federal action is (p. 4) essential to assure "national uniformity of treatment" for certain sources of noise, 42 U.S.C. 4901(a). Aside from the express preemption language of section 17, the legislative history of the Act clearly reflects Congress' concern that there be "maximum prac-

---

2 States may, however, adopt and enforce standards identical to EPA standards. Section 17(c)(1).

3 See sections 6(c), 17(c), 18(c). For railroads, Congress provided an "escape" from total preemption if the EPA Administrator after consulting with the Secretary of Transportation determines that state and local regulation is "necessitated by special local conditions" and will not be in conflict with EPA's regulatory actions. Section 17(c)(2).

tical uniformity'' in noise regulation for interstate carriers such as railroads and motor carriers.[4]

(p. 5) The principal case addressing the issue of preemption under the NCA is the D.C. Circuit's decision in *Association of American Railroads (''AAR'') v. Costle*, 562 F.2d 1310 (D.C. Cir. 1977). *AAR* relied on Congress'

---

[4] Debate on the Senate Committee Report for the NCA bears this out. Two excerpts illustrate this concern:

Senator Randolph:

> "I also bring to the attention of the Senate the the provisions in title V of S. 3342, which establishes a regulatory framework for noise from interstate trucks and buses and the operations of railroads. Here, as well as in the area of product noise emission standards, the transportation industry is faced with the prospect of conflicting noise control regulations in every jurisdiction along their routes. It is completely inappropriate for interstate carriers or interstate transportation to be burdened in this way.

118 Cong. Rec. 35412 (1972) (remarks of Senator Randolph).

Senator Hartke:

> "Mr. HARTKE. Mr. President, one of the basic purposes of title V of this bill, as explained in the committee report, is to assure the maximum practical uniformity in regulating the noise characteristics of interstate carriers such as the railroads and motor carriers which operate from coast to coast and through all the States, and in hundreds of communities and localities.
>
> "Without some degree of uniformity, provided by Federal regulations of countrywide applicability which will by statute preempt and supersede any different State and local regulations or standards, there would be great confusion and chaos. Carriers, if there were not Federal preemption, would be subject to a great variety of differing and perhaps inconsistent standards and requirements from place to place. This would be excessively burdensome and would not be in the public interest."

118 Cong. Rec. 35881 (1972) (remarks of Senator Hartke).

intent to assure national uniformity of treatment for the railroad industry in overturning EPA's decision only to regulate locomotives and rail cars. Here, the district court relied on *AAR*, stating that:

> *Costle* concluded that the plain language of Section 17 of the Act did not permit the interpretation that Congress intended to vest discretion in the EPA to decide *which of the* equipment and facilities would be subject to regulation. *Id.* at 1315 (emphasis supplied by court). The court found that the reference to "equipment and facilities" was unambiguous and "subsumes *all* such equipment and facilities." *Id.*

Slip op. at 6.

The court below here then addressed the key issue of whether preemption extended to the present situation where EPA, following remand in *AAR*, expressly considered and then declined to issue a property-line standard for railroad facilities because it found that the "cumulative effect" of other railroad standards was to regulate railroad equipment and that the additional property-line standard was unnecessary in order to achieve "national (p. 6) uniformity of treatment." 47 Fed. Reg. 54107-54108 (1982). Thus, the court below concluded that EPA's decision to withdraw its proposed property-line standard for railroad facilities due to the adequacy of existing standards did not create a "regulatory gap" allowing Delaware to regulate such facilities. While the Agency's Federal Register notice withdrawing the proposed property-line standard did not unambiguously address the preemptive effect issue under section 17, EPA believes that the district court's ruling on preemption here was correct for two reasons.

First, when EPA considered and then declined to issue a property-line standard, it concluded that its prior standards for railroad equipment effectively regulated noise from railroad facilities as well.[5] Thus, under the literal language of section 17(c)(1), it appears that any state regulation of railroad facilities, including Delaware's property-line standard, is preempted.[6]

Second, in withdrawing its proposed property-line standard, EPA concluded that, in view of its prior standards, further standards for sources of railroad noise were unnecessary.[7] (p. 7) "[A] federal decision to forego regulation in a given area may imply an authoritative federal determination that the area is best left unregulated, and in that event would have as much pre-emptive force as a decision to regulate." *Arkansas Elec. Co-op Corp. v. Arkansas Public Commission*, 103 S. Ct. 1905, 1912 (1983); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 178 (1977). Thus, Delaware's attempt to regulate railroad facilities by means of a property-line standard, after EPA had ex-

---

5 47 Fed. Reg. at 54108.

6 In addition, the fact that Congress carved out an express "escape" procedure under § 17(c)(2) whereby states and localities may specifically petition EPA and DOT to allow them to regulate certain sources of railroad noise as justified under "special local conditions" further supports the view that § 17(c)(1) was intended to have a broad preemptive effect. This is so because Congress felt that preemption could only be defeated if the (c)(2) procedure was invoked and a specific determination was made by EPA in consultation with DOT.

7 *Id.* Delaware had an adequate remedy to challenge EPA's decision not to regulate railroad facilities. It could have filed a petition to review EPA's decision to withdraw the proposed standard under section 16(a) of the NCA. 42 U.S.C. 4916(a).

pressly considered and declined to do so, would appear to be preempted under this line of analysis as well.[8]

II

THE QUIET COMMUNITIES ACT OF 1978 DID NOT LESSEN THE BROAD PREEMPTIVE EFFECT OF SECTION 17 OF THE NOISE CONTROL ACT

Delaware contends on appeal that the Quiet Communities Act of 1978, P.L. 95-609, cut back the preemptive effect of the NCA and implicitly authorized state and local noise regulation. This is incorrect. If anything, the Quiet Communities Act reiterated the broad preemptive effect of the NCA.

Essentially, the Quiet Communities Act encourages federal/state cooperation in noise abatement efforts and provides limited funding to states in order to supplement their resources (p. 8) in that regard. See. R. No. 95-1171, 95th Cong. 2d Sess., reprinted in 1978 U.S. Code Cong. & Ad. News 7569, 7570. Congress took care, however, not to erode the provisions of the Act:

> No actions, plans, or programs hereunder shall be inconsistent with the existing Federal authority under [the Noise Control Act] to regulate sources of noise in interstate commerce.

---

[8] EPA's decision did not expressly address whether other sources of railroad noise were "best left unregulated." Its conclusion was that it had satisfied its own statutory duty to issue standards for railroad equipment and facilities, and that further federal standards were unnecessary. 47 Fed. Reg. at 54108. Conceivably state standards for railroad equipment that EPA has neither regulated nor considered regulating might not be preempted. That question, however, is not presented in this case.

42 U.S.C. § 4913(c)(1) (subsection (c)(1) of the Quiet Communities Act).

The only case to date construing the Quiet Communities Act is *San Diego Unified Port District v. Gianturco,* 651 F.2d 1306, 1313 (9th Cir. 1981), *cert. denied,* 455 U.S. 1000, which was decided against the background of the Supreme Court's 1973 ruling in *City of Burbank v. Lockheed Air Terminal, Inc.,* 411 U.S. 624 (1973), which defined the scope of federal preemption under the Noise Control Act for aviation noise sources. In *Gianturco,* the California Transportation Agency (CALTRANS) relied on the QCA in attempting to impose an airport curfew, distinguishing such regulation from federal regulation of aircraft noise sources. CALTRANS agrued that the nationwide quiet communities program under the QCA indicated a congressional intent "to reject total federal control of the source of aircraft noise and to involve local governments in the national effort to abate such noise" 651 F.2d at 1312. The *Gianturco* court rejected CALTRANS position. The court read subsection (c)(1) of the Quiet Communities Act as Congressional reaffirmation of the judicially interpreted scope of preemption under the Noise Control Act, holding that "Congress intended to continue such preemption." *Id.* at 1313.

(p. 9) In short, EPA believes the Quiet Communities did not narrow the preemptive effect of Setcion 17 of the NCA.

Conclusion

For the reasons set forth above, the Delaware property-line standard appears to be preempted by section 17 of the Noise Control Act.

Respectfully submitted,

F. HENRY HABICHT II
Assistant Attorney General
Land and Natural Resources Division

/s/ LAWRENCE R. LIEBESMAN, Attorney
Environmental Defense Section
Land and Natural Resources Division
U.S. Department of Justice
P.O. Box 23986
Washington, D.C. 20026-3986
(202) 633-2281

OF COUNSEL:

FRANCIS S. BLAKE
General Counsel
U.S. Environmental Protection Agency
Washington, D.C. 20460

PETER H. WYCKOFF
Acting Associate General Counsel
Air and Radiation Division
U.S. Environmental Protection Agency
Washington, D.C. 20460

GERALD GLEASON
Assistant General Counsel
Office of General Counsel (LE-132A)
U.S. Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

Supreme Court, U.S.
FILED
JUN 6 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1773

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

CHARLES M. OBERLY, III AND JOHN E. WILSON, III,
Appellants,

v.

THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

APPELLANTS' BRIEF IN REPLY TO MOTION TO AFFIRM

By: Charles M. Oberly, III
Attorney General

Fred S. Silverman
State Solicitor

John J. Polk
Deputy Attorney General
Counsel of Record

Department of Justice
Carvel State Building
Wilmington, Delaware 19801
(302) 571-2467

Date: June 5, 1986 *Counsel for Appellants*

PACKARD PRESS / LEGAL DIVISION, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

12/

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT

I. DELAWARE DOES NOT SEEK TO REGULATE RAILYARD NOISE REGULATED BY THE ENVIRONMENTAL PROTECTION AGENCY 1

A. Why The *Atlantic Richfield* Holding Is Inapplicable Here 3

B. Regulating Some Of The Parts Is Not Equivalent To Regulating The Sum Of The Parts 5

II. FEDERALISM SUFFERS FROM UNCERTAINTY OVER FEDERAL INVOLVEMENT IN A STATE'S REGULATORY PROCESSES 7

CONCLUSION 9

TABLE OF AUTHORITIES

Cases:	Page
Arkansas Electric Cooperative Corp. v. Arkansas Public Commission, 461 U.S. 375 (1983)	3
Association of American Railroads v. Costle, 562 F.2d 1310 (D.C.Cir. 1977)	5
Brown v. Hotel and Restaurant Employees and Bartenders, 104 S.Ct. 3179 (1984)	2
Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978).	3
Statutes:	
42 U.S.C. §4916(c)	2, 3
42 U.S.C. §4916(c)(1)	3, 8
42 U.S.C. §4916(c)(2)	7, 8
Legislative History:	
118 Cong.Rec. 37318 (1972), *reprinted in*, A Legislative History of the Noise Control Act of 1972 (1974)	4
Regulatory Provisions:	
40 C.F.R. §201.11	6
40 C.F.R. §201.11(c)	5
40 C.F.R. §201.12	6
40 C.F.R. §201.12(c)	5
40 C.F.R. §201.13	6
40 C.F.R. §201.14	6
40 C.F.R. §201.15	6
40 C.F.R. §201.16	6
39 Fed.Reg. 24582	6
44 Fed.Reg. 22961	5
45 Fed.Reg. 1258	4
47 Fed.Reg. 54107-54108	3

No. 85-1773

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

CHARLES M. OBERLY, III AND JOHN E. WILSON, III,
Appellants,

v.

THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

APPELLANTS' BRIEF IN REPLY TO MOTION TO AFFIRM

ARGUMENT

I. DELAWARE DOES NOT SEEK TO REGULATE RAILYARD NOISE REGULATED BY THE ENVIRONMENTAL PROTECTION AGENCY.

Federal standards regulate only six sources of railroad noise. All the regulated sources are typically associated with railroad operations. As such, the noise from these sources reasonably can be expected to occur

throughout the nation. It makes sense, then, that uniform federal standards immunize railroads from potentially diverse state regulations.

However, Delaware does not seek to regulate noise from any of those six sources. The incessant noise from parked refrigerated truck trailers has tenuous ties to typical railroad noise. Noise from these trailers becomes an environmental problem when railroads operating a "piggyback" terminal locate the parking lot for refrigerated trailers adjacent to an existing residential community. Federal regulations erect no barrier around the noise from this parking lot. If Congress' language in 42 U.S.C. §4916(c) is to be given any effect, then states may regulate railroad noise emissions for which the Environmental Protection Agency ("EPA") has established no standard.

The Baltimore & Ohio Railroad, the Baltimore & Philadelphia Railroad, Mount Clare Properties (Delaware), Inc., and the Chessie Motor Express ("the Chessie group") offer a two-pronged response to this argument. First, they say that the EPA's decision not to regulate noise from parked refrigerated trailers constituted an authoritative determination that the area is best left unregulated. Alternatively, they argue that the EPA effectively "regulated noise emissions from all railroad equipment and facilities" by enacting standards which limited the major sources of noise from railyards. Appellees' Motion To Affirm 10 - 11. The first response defies the language of 42 U.S.C. §4916(c); the second defies logic.

Both responses ignore the language of 42 U.S.C. §4916(c). The Chessie group's failure to discuss what Congress said about the extent of preemption is fatal to the group's motion to affirm. The intent of Congress is conclusive concerning the nature and extent of preemption. *Brown v. Hotel and Restaurant Employees and Bartenders*, 104 S.Ct. 3179 (1984).

A. Why The *Atlantic Richfield* Holding Is Inapplicable Here.

The first prong of the Chessie group's argument rests entirely on a portion of this Court's holding in *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978)(discussing the Ports and Waterways Safety Act of 1972). The Court acknowledged that a federal regulation in a particular field may preempt state law when the federal regulator's decision "takes on the character" that the state law approach was inappropriate. 435 U.S. at 178. This rule was expanded in *Arkansas Electric Cooperative Corp. v. Arkansas Public Commission*, 461 U.S. 375 (1983)(discussing the Federal Power Act and the Rural Electrification Act). The Court referred to the precept that preemption could result from a federal "determination that the area is best left unregulated." 461 U.S. at 384.

The language of 42 U.S.C. §4916(c), however, renders this line of authority inapplicable. In that section, Congress delineated the scope of federal preemption which applies to the Federal Noise Control Act.

Congress stated that preemption occurs "after the effective date of [an EPA] regulation." 42 U.S.C. §4916(c)(1). A decision not to regulate lacks an effective date. Thus the EPA's decision to withdraw standards governing standing refrigerator cars never met the threshold requirement of the statute and never triggered its preemption clause. See 47 Fed.Reg. 54107-54108.

The next condition, which Congress imposed, precludes states from regulating "noise emissions resulting from the operation of the *same equipment and facility*" for which there is an "applicable" federal regulation. 42 U.S.C. §4916(c)(1). Congress was specifically aware that this was the nature of the preemption clause of the statute. During floor debates, Senator Tunney stated, "[P]reemption . . . only occurs in areas of regulation where adequate Federal regulations are in effect." 118

Cong.Rec. 37318 (1972), *reprinted in*, A Legislative History of the Noise Control Act of 1972 at 40 (1974). Clearly the EPA's decision to withdraw a refrigerator car standard created no "applicable" regulation as to refrigerated trailers. Once again, the statutory prerequisites to confer preemptive effect on federal regulatory efforts were not met.

Even if one could ignore the statutory language as the Chessie group does, the peculiar regulatory history of EPA's decision to withdraw refrigerator car standards does not bring this case within the rule of *Atlantic Richfield*. The history discloses that the proposed regulations governing refrigerator cars were not designed to address the noise from refrigerated truck trailers.[1] Indeed, the EPA decided to withdraw a standard applicable to refrigerator cars because the use of such cars was declining. 45 Fed.Reg. 1258. Operations using refrigerated trailers were displacing the use of refrigerator cars. *Id.* The EPA acknowledged that it had not considered the noise which Delaware seeks to regulate: refrigerator units on truck trailers and containers used in TOFC-/COFC operations "were not addressed by EPA in the proposed rules." *Id.*, col. 2.

The EPA did address the general noise from TOFC-/COFC operations and promulgated no standard for noise from such operations. Presumably, the EPA considered regulating TOFC/COFC noise through a property line standard.[2] A-9. To be sure, the Status Report in

---

1. Refrigerator cars are railcars equipped with refrigeration units. Refrigerated truck trailers are truck trailers on which refrigeration units have been mounted. The location of refrigerator cars within a railyard is limited by the placement of the rails. In contrast, refrigerated truck trailers can be lifted from flat cars and driven to any location.

2. Delaware's intent to regulate noise from parked refrigerated trailers does not result in the imposition of a property line standard. A property line standard would encompass all the sound from a particular facility as measured from the property line of that facility. See

Association of American Railroads v. Costle, 562 F.2d 1310 (D.C.Cir. 1977) as well as the published EPA comments suggest that property line standards were deemed unnecessary because existing standards covered the major sources of railyard noise.[3] But there are two reasons why this justification says nothing about regulating offloaded, parked refrigerated truck trailers.

First, noise from TOFC/COFC operations includes more than refrigerated unit noise. See Jurisdictional Statement at 3 - 4. The noise source, among those considered by the EPA, which is most analogous to refrigerated trailer noise is noise from stationary refrigerator cars. And, as noted, the EPA withdrew the standard for that noise for reasons unassociated with the desirability of regulation.

Second, in withdrawing the property line standard, the EPA did not express the belief that the area of refrigerated truck trailer noise was best left unregulated. As a result, *Atlantic Richfield* type preemption is inapplicable given this statutory and regulatory history.

B. Regulating Some Of The Parts Is Not Equivalent To Regulating The Sum Of The Parts.

The second prong of the Chessie group's argument relies on the justification offered by the EPA and the Association of American Railroads for the withdrawal of the

---

44 Fed.Reg. 22961. Although Delaware proposes to enforce its regulations by measuring noise levels from neighboring property, only one source of noise emissions will be targetted: parked refrigerated trailers. The EPA condones similar property line measurements for other sources. See 40 C.F.R. §201.11(c), §201.12(c)(noise from stationary switchers can be measured from neighboring property).

3. History supports the inference that the EPA was motivated to withdraw the refrigerated trailer standard by the willingness of the Association of American Railroads to settle its lawsuit. This point is argued in the Jurisdictional Statement at page 12 and will not be restated here.

property line standard. In summary, property line standards were deemed unnecessary because "the cumulative effect of regulating [railyard] equipment" limits the total level of noise emissions from the railyard. Appellees' Motion To Affirm at 7, 11 - 12. Given the extent of federal regulation, this reasoning defies logic.

Federal standards govern noise from stationary locomotives and switchers, 40 C.F.R. §201.11; moving locomotives and switchers, 40 C.F.R. §201.12; moving rail cars, 40 C.F.R. §201.13; retarder operations, 40 C.F.R. §201.14; car coupling operations, 40 C.F.R. §201.15; and locomotive load cell test stands, 40 C.F.R. §201.16. But these are only a small part of the sources of noise in a railyard. The EPA recognized numerous other sources of noise when it first considered promulgating regulations. That agency listed horns, bells, whistles, and other warning devices as sources of railroad noise. 39 Fed.Reg. 24582. Snow plows, track laying equipment, cranes, and other special purpose railroad equipment also emit noise. *Id.*

Like the noise from refrigerated trailers, no federal standard limits these sources individually. And, as a result, the existing federal standards are ineffective in limiting the total noise level to which these unregulated sources contribute. An effective ceiling on the total noise level can be achieved either by setting a property line standard or by enacting individual standards for each and every source of noise within the railyard. Having rejected the property line standard and having enacted standards for six sources of railroad noise emissions, the EPA regulated only a part of the noise coming from railyards. The total noise level remains unchecked.

II. FEDERALISM SUFFERS FROM UNCERTAINTY OVER FEDERAL INVOLVEMENT IN A STATE'S REGULATORY PROCESSES

The Chessie group's suggestion that 42 U.S.C §4916(c)(2) eliminates any threat to federalism misses the point. The appellants' discussion transcended an application to railroad noise. The threat comes from fashioning a rule of preemption which ties a state's regulatory hands every time a federal agency decided, for whatever reason, not to enact a federal standard. That is the precise rule the lower courts applied in this case.

Nevertheless, the Chessie group's reading of 42 U.S.C. §4916(c)(2) would chill the independent exercise of a state's regulatory power. That section permits a state to enforce its railroad noise emission standards against a federally regulated source. The state may do so, however, only if two federal officials can be persuaded that enforcement of the state standard is "necessitated by special local conditions." 42 U.S.C. §4916(c)(2). Rather than eliminating the threat to federalism, this provision embraces it.

If the Chessie group's and the lower courts' view is permitted to stand, state regulation of a specific source of railroad noise will be preempted if the EPA considered, but failed to enact, a standard governing that source. It is relatively simple for a state regulator to determine what regulations the EPA has enacted. A more difficult task is to ascertain those that the EPA failed to enact. Absent a clear decision by a federal regulator that neither state nor federal regulations are needed, state regulators are left to guess as to what, if anything, they may regulate.

In this case, the Chessie group has stated that the EPA believes it has regulated "noise emissions from all railroad equipment and facilities." Appellees' Motion to Affirm at 10 - 11. Presumably, then, no state regulator can seek to enforce a state standard governing any noise

emitted from a railroad facility unless it seeks the approval of federal officials. Such an interpretation swallows in its entirety the state sovereignty component of federalism.

For this reason, the appellants' reading of §4916(c)(2) makes more practical sense. It is also more consistent with the language of §4916(c)(1). Appellants submit that the provisions of §4916(c)(2) are triggered only when a state wishes to regulate a source of railroad noise for which an applicable federal regulation exists. The ease of locating existing federal regulations serves as reassurance to state regulators that the standard they propose will be constitutional. Moreover, a literal reading of §4916(c)(1) indicates that the state is preempted from regulating only federally regulated sources.

Contrary to the intent of Congress, states across the nation are left powerless to protect their citizens from noise whenever the source happens to be located within the confines of railyard. This Court must eliminate this result by either giving effect to the express intent of Congress or correcting the misapplication of *Atlantic Richfield*.

CONCLUSION

For all of the foregoing reasons, the State officials respectfully ask this Court to summarily reverse or grant plenary consideration of the question presented by this appeal.

Dated: June 5, 1986

Charles M. Oberly, III
Attorney General of the
State of Delaware
Attorney for Appellant

Fred S. Silverman
State Solicitor

John J. Polk
Deputy Attorney General
Counsel of Record

(5)

Supreme Court, U.S.
FILED
NOV 10 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1773

In the Supreme Court of the United States

OCTOBER TERM, 1986

CHARLES M. OBERLY III, AND JOHN E. WILSON, III,
APPELLANTS

v.

BALTIMORE & OHIO RAILROAD COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

CHARLES FRIED
Solicitor General
F. HENRY HABICHT II
Assistant Attorney General
PETER R. STEENLAND
RAYMOND B. LUDWISZEWSKI
KAREN L. FLORINI
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

FRANCIS S. BLAKE
General Counsel
Environmental Protection Agency
Washington, D.C. 20460

QUESTION PRESENTED

Whether application of the state noise control regulation at issue here to an interstate rail shipping facility is preempted by the Environmental Protection Agency's determination in 1982 that railroad facility regulations under the Noise Control Act of 1972, 42 U.S.C. (& Supp. II) 4901 *et seq.*, were unnecessary.

TABLE OF CONTENTS

	Page
Statement	1
Argument	7
Conclusion	13
Appendix	1a

TABLE OF AUTHORITIES

Cases:

Arkansas Electric Coop. v. *Arkansas Public Service Comm'n*, 461 U.S. 375 ..... 6, 12

Association of American Railroads v. *Costle*, 562 F.2d 1310 3

City of Burbank v. *Lockheed Air Terminal, Inc.*, 411 U.S. 624 9

Hillsborough County v. *Automated Medical Laboratories, Inc.*, No. 83-1925 (June 3, 1985) 8, 11, 12

Pacific Gas & Electric Co. v. *State Energy Resources Conservation and Development Comm'n*, 461 U.S. 190 8

Wardair Canada v. *Florida Dep't of Revenue*, No. 84-902 (June 18, 1986) 7

Constitution, statutes, regulation and rule:

U.S. Const.:

Art. I, § 8, Cl. 3 (Commerce Clause) 5

Art. VI, Cl. 2 (Supremacy Clause) 8

Amend. XIV 5

Noise Control Act of 1972, 42 U.S.C. (& Supp. II) 4901 *et seq.*:

§ 17, 42 U.S.C. 4916 .....2, 7, 9, 11

§ 17(a), 42 U.S.C. 4916(a) 3

§ 17(c), 42 U.S.C. 4916(c) 3, 7, 8

§ 17(c)(2), 42 U.S.C. 4916(c)(2) 8

40 C.F.R. 201.11-201.16 ..... 2, 10

Fed. R. App. P. 42 ..... 4, 11

Miscellaneous: Page

118 Cong. Rec. (1972):
p. 37083 10
p. 37318 ..... 8, 9
41 Fed. Reg. (1976):
p. 2184 ..... 3, 12
p. 2185 ..... 3, 12
44 Fed. Reg. 22960 (1979) 3
45 Fed. Reg. (1980):
p. 1252 3
p. 1258 4
47 Fed. Reg. (1982):
p. 54107 5
p. 54108 ..... 5, 11
48 Fed. Reg. 27039 (1983) 12
49 Fed. Reg. 26738 (1984) 12
51 Fed. Reg. 850 (1986) 12
H.R. 11021, 92d Cong., 1st Sess. (1971) 8
S. 3342, 92d Cong., 2d Sess. (1972) 8

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1773

CHARLES M. OBERLY III, AND JOHN E. WILSON, III,
APPELLANTS

v.

BALTIMORE & OHIO RAILROAD COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. The Wilsmere "intermodal" shipping facility, so termed because both rail and trucking operations are handled there, is a privately owned and operated railyard located in New Castle, Delaware, directly adjacent to a residential neighborhood. In addition to the noise associated with all railyards, intermodal facilities generate noise through operation of "piggyback" refrigeration units, known as trailers on flat cars (TOFCs), which can be transferred as a unit between truck-trailers and railroad flatcars. The noise results from the fact that the generators or compressors of the units operate continuously so that the units remain cold while awaiting further transport (J.S. App. A3).

Until recently, the Wilsmere facility was operated primarily as a rail switching yard. Beginning in late 1983, however, intermodal operations increased dramatically:

in the 8-month period ending July 31, 1984, the average number of refrigerated trailers at the facility was 30 per day, a figure that varied greatly on a seasonal basis, from a low of 1 per day in July to a high of 62 per day in May. J.S. App. A69 para. 7. Noise complaints by neighboring residents showed a parallel increase, prompting the Delaware Department of Natural Resources and Environmental Control (DNREC) to inform the owners of the Wilsmere facility in August 1984 that DNREC was preparing to file suit to seek injunctive relief for violations of the Delaware Noise Control Act and its implementing regulations. J.S. App. A54 para. 11. Specifically, Section 6.0.2 of the state noise regulations prohibits any source from emitting noise that "exceeds the ambient noise level by 10 dBa when measured at the point of complaint origination within the receiving property."[1] J.S. App. A49. Measurements taken by DNREC showed that the ambient noise level without the refrigerator units running was 52 dBa, while the level with the units running was 79 dBa (a total of 27 dBa of noise above the ambient levels). J.S. App. A94 paras. 12, 14.

2. Section 17 of the Noise Control Act of 1972, 42 U.S.C. 4916, requires the Administrator of the Environmental Protection Agency (EPA) to promulgate noise emission regulations pertaining to the "operation of the equipment and facilities of surface carriers engaged in interstate commerce by railroad." Although there are no federal regulations governing noise emissions from TOFC equipment, noise emissions from other kinds of interstate rail carrier equipment are extensively regulated. 40 C.F.R. 201.11-201.16. EPA first issued rail regulations in 1976, when it promulgated a trio of regulations that governed locomotive operations under stationary and moving conditions, and rail car operations. At that time, EPA stated

---

[1] "dBa" are decibels as measured by a particular methodology. Because the dBa scale is logarithmic, each increase of 10 decibels indicates a perceived doubling of sound.

that it had concluded that other types of equipment and facilities could best be regulated by state and local governments, because the problems they caused were primarily local in nature, and it appeared that such regulations would have no adverse effect on interstate commerce. 41 Feg. Reg. 2184, 2185 (1976).

The following year, however, the agency was directed to promulgate further standards. *Association of American Railroads* v. *Costle* (*AAR*), 562 F.2d 1310 (D.C. Cir. 1977). Resting its analysis in part on Section 17(c)'s preemption provision, the *AAR* court interpreted Section 17(a) as giving EPA no discretion in determining the scope of its duty to regulate. Instead, the court held that Section 17(a) obliged the agency to regulate all "equipment and facilities" as that term was customarily used in the interstate rail industry. Leaving in effect the three regulations previously promulgated by EPA, the court ordered the agency to promulgate additional regulations within a year.

Thereafter, EPA proposed a package of regulations covering retarders, refrigerator rail cars, and car coupling operations; the agency also proposed property-line standards limiting the total noise emitted by a railroad facility. 44 Fed. Reg. 22960 (1979).[2] The retarder and car-coupling standards were promulgated in final form on January 4, 1980. 45 Fed. Reg. 1252.[3] At that time, EPA stated that further time was needed to analyze the public comments on the proposed property-line standards; the agency also noted that public commenters had stated that refrigerator

---

[2] The agency stated that the proposed "standards [would] meet the requirement of the Court order of providing comprehensive preemption." 44 Fed. Reg. 22961 (1979).

[3] EPA also promulgated standards for locomotive load cell test stands and switcher locomotives, which had not previously been proposed, but which had been discussed in the context of the prior proposal's property-line standard and on which public comments had been received.

cars were seldom being manufactured any longer, and questioned whether a refrigerator car standard was necessary. 45 Fed. Reg. 1258 (1980). As a result of these comments, the agency decided not to promulgate a source standard for refrigerator cars, "in part to allow time to evaluate the effect of their declining use" (*ibid.*). The agency observed that refrigerator cars were being replaced by TOFCs and that TOFCs had not been "addressed by EPA in the proposed rules" (*ibid.*). The agency stated that it expected to respond further to those comments in its promulgation scheduled for January 1981 (*ibid.*).

However, EPA did not proceed with the scheduled promulgation. Instead, on November 12, 1981, the parties to the *AAR* litigation filed with the court a "Status Report," stating that the agency had "concluded that no further standards are necessary to regulate rail facilities and equipment" (J.S. App. A78). After describing the additional equipment standards that already had been promulgated pursuant to the court's order, the report stated (J.S. App. A78-A79):

> the cumulative effect of these standards * * * effectively [is to] regulate both railroad equipment and railroad facilities. * * * Since the cumulative effect of regulating equipment used within railyards is also to regulate to a significant degree noise emissions from rail facilities, the parties agree that it is unnecessary for EPA to establish fur[t]her property line facility emission standards specifically for railyards.

An agreement to dismiss the appeal pursuant to Fed. R. App. P. 42 was submitted by the parties, and an order of dismissal was entered by the court on November 24, 1981.

EPA then published a Federal Register notice reflecting this agreement, in which it explained:

> The parties to the [*AAR*] case filed an agreement to dismiss on November 12, 1981, stating their belief

> that standards promulgated to date satisfied the Court's order.
>
> * * * * *
>
> The standards promulgated to date cover the major sources of noise from railroad equipment which in turn generate a larger proportion of the noise emissions from rail facilities. Since those standards addressed the major sources of noise from railroad operations, and since the cumulative effect of regulating equipment used within railyards is also to regulate, to a significant degree, noise emission from rail facilities, it was agreed by the AAR, the State of Illinois [as intervenor-defendant] and EPA that it is unnecessary for EPA to establish further property line facility emission standards.

47 Fed. Reg. 54107, 54108 (1982). Concluding that "the proposed standards are unnecessary," EPA withdrew both the proposed property line and refrigerator car standards (*ibid*).

3. Appellees filed this action for declaratory and injunctive relief when they were informed of the State's intention to take enforcement action against the Wilsmere facility.[4]

The district court granted a preliminary injunction, concluding that EPA had preempted the entire field of noise

---

[4] In addition to alleging that Delaware's regulation, as applied, was preempted by the federal regulations, the complaint also alleged that the Delaware regulation as applied was an impermissible burden on interstate commerce in violation of the Commerce Clause, and that the Delaware Act and its implementing regulations were void for vagueness under the Fourteenth Amendment. Because of their rulings on preemption, the lower courts did not reach those issues. If the preemption determination now on appeal is reversed (either by this Court after noting probable jurisdiction or by the court below on remand if this Court vacates and remands for reconsideration), a fuller factual record on the Commerce Clause issue would be required before that issue could be addressed.

emissions from interstate rail carriers. The district court observed that regulatory preemption may occur even absent a directly applicable federal regulation, because a " 'federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated, and in that event would have as much pre-emptive force as a decision *to* regulate.' " J.S. App. A8 (quoting *Arkansas Electric Coop* v. *Arkansas Public Service Comm'n*, 461 U.S. 375, 384 (1983) (emphasis in original but not included by the district court)). The district court concluded that EPA's 1982 decision to withdraw its proposed refrigerator car and property-line standards constituted such a preemptive determination (J.S. App. A6-A8). Based on that withdrawal, the court concluded that the states were permanently precluded from implementing similar regulations, and thus enjoined Delaware from taking enforcement action against the Wilsmere facility. The court of appeals affirmed[5] in a short per curiam opinion adopting the reading of the district court (J.S. App. A18-A20).[6]

---

[5] The appeal to the court of appeals was taken from the district court's entry of a preliminary injunction. At oral argument before the court of appeals, however, the parties informed the court that they did not contemplate putting on any additional evidence. The court requested the parties to stipulate that the court could review the matter "on the standards which one would evaluate a final injunction rather than a preliminary injunction," and the parties did so. J.S. App. A24.

[6] The court of appeals noted that in an amicus curiae filing made at the court's request, the Environmental Protection Agency agreed that the federal regulations preempt application of state noise regulations to the Wilsmere facility (J.S. App. A20). Regrettably, because of a failure of communication within the Department of Justice, that brief was filed in the court of appeals without having been brought to the attention of either the Assistant Attorney General for Land and Natural Resources or the Solicitor General, and therefore without the former's approval or the latter's authorization.

ARGUMENT

1. We consider first the statute and its legislative history in order to discern Congress's expectations as to the preemptive scope of federal regulations issued under Section 17. See *Wardair Canada* v. *Florida Dep't of Revenue,* No. 84-902 (June 18, 1986), slip op. 4 ("the first and fundamental inquiry in any pre-emption analysis is whether Congress intended to displace state law"). On the basis of that consideration, we conclude that federal regulations under Section 17 were to have a narrow preemptive effect, preempting only state regulations that sought to regulate, directly or indirectly, the *same type* of equipment or facility. Contrary to the assumptions of the courts below, Congress did not intend federal regulations to have a blanket preemptive effect upon the entire field.[7]

a. The wording of Section 17(c) supports a narrow interpretation. Under that provision preemption occurs only *after* the "effective date of *a* regulation," and bars states from adopting "any standard" applicable to "the *same* equipment or facility * * * unless such standard is identical to *a* [federal] standard * * *." This language strongly suggests that each federal regulation, as it is enacted, bars *analogous* state regulations: it cannot reasonably be read as indicating that the adoption of any federal regulation—or the decision not to issue a regulation—bars all subsequent state efforts to regulate interstate rail carriers.[8]

---

[7] Accordingly, at least insofar as the *AAR* decision was based on a different reading of the Section 17 preemption provision, we believe it was erroneous.

[8] The state should probably be preempted from indirectly, as well as directly, regulating equipment and facilities that are federally regulated. For example, if there were a federal TOFC noise regulation, the state would be preempted from enforcing a general property line noise regulation in a situation where the violation resulted from noise attributable to TOFCs that complied with the federal standard. Because there is no federal TOFC standard, however, it is unnecessary to consider here the extent of the indirect preemptive effect of federal noise regulations.

This narrow reading of Section 17(c) does not render it superfluous, although state regulations that are in actual conflict with federal regulations are automatically preempted by the Supremacy Clause, even in the absence of any preemption clause in the relevant federal statute (see, *e.g., Hillsborough County* v. *Automated Medical Laboratories, Inc.*, No. 83-1925 (June 3, 1985), slip op. 5). Section 17(c) significantly lowers the burden of establishing preemption. Under Section 17(c), all that need be established is that both state and federal regulations apply to the same type of equipment. It is not necessary, as it would be in the absence of Section 17(c), to assume the further burden of establishing that compliance with both sets of regulations is impossible, or that the local law obstructs the accomplishment of the objectives of the federal law. Cf. *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation and Development Comm'n*, 461 U.S. 190, 204 (1983).

Similarly, the existence of the waiver provisions of Section 17(c)(2) is consistent with a narrow reading of the exemption provision; Congress in that subsection simply provided a procedure for permitting a state to enforce regulations that do overlap analogous federal regulations. See 118 Cong. Rec. 37318 (1972) (Sen. Tunney, bill sponsor, explains that waivers under 17(c)(2) would be appropriate "where local law requires lower speeds or different operating procedures, or modifications of routing").

b. The minimal legislative history of the preemption provision tends to support our interpretation. The authority for EPA to regulate noise emission from interstate carriers (and the associated preemption provision) was included in the original Senate bill (S. 3342, 92d Cong., 2d Sess. (1972)), not the original House bill (H.R. 11021, 92d Cong., 1st Sess. (1971)). After passage by the House, H.R. 11021 was sent to the Senate, which struck everything after the enacting clause and inserted in lieu thereof the text of S. 3342. H.R. 11021 then went back to the House, which likewise struck everything after the

enacting clause and substituted a compromise text that incorporated elements of both the original House and Senate bills. The Senate immediately acceded to the final House bill without further amendment and after very brief debate. Section 17 first appeared in its final form in the compromise House bill.

This Court has recognized (*City of Burbank* v. *Lockheed Air Terminal, Inc.*, 411 U.S. 624, 637 (1973)) that, in interpreting the Noise Control Act, "[t]he statements by Congressman Staggers and Senator Tunney are weighty ones." Unfortunately, those statements do not appear to be entirely consistent on this issue. We submit, however, that Senator Tunney's remarks in presenting the compromise House bill to the Senate are persuasive (118 Cong. Rec. 37318 (1972)):

> The purpose of the [interstate carrier] amendment is to reduce the impact of conflicting State and local noise controls on interstate carriers.
>
> I would stress, Mr. President, that the preemption provided in these sections only occurs in areas of regulation where adequate Federal regulations are in effect.

This succinct explanation of the precise provision under consideration, identifying the nature of the congressional concern over federal-state conflicts, was presented to the Senate as the authoritative explanation of the provision that they promptly adopted. It is, therefore, entitled to very substantial weight as an indication of congressional intent.

In contrast, the House debates on the compromise bill contain no specific references to the new interstate carrier provision or its associated preemption and exemption provisions. In explaining his motivation for urging passage of

a federal noise control act, Representative Staggers simply remarked (118 Cong. Rec. 37083 (1972)):

> We have evidence that across America some cities and States are trying to pass noise regulations. Certainly we do not want that to happen.

This is hardly an authoritative interpretation of the scope of the particular preemption provision in the interstate carrier section of the bill. Indeed, Congressman Staggers could scarcely have been focusing on that provision, because it in fact *weakened* the Senate bill's original preemption provision:[9] The original Senate version provided for preemption, "after the effective date of [federal] regulations," of state or local standards "*respecting* noise emissions resulting from the operation of equipment or facilities of surface carriers engaged in interstate commerce by railroad." In contrast, the House version (which was enacted) takes effect "after the effective date of *a* [federal] regulation" and preempts only state or local standards "applicable to noise emissions resulting from the operation of *the same* equipment or facility of *such* carrier." See App., *infra*, 1a.

2. The application of these general principles to the particular factual situation at issue in this case turns on the proper interpretation of the EPA's statements in 1982 that further standards, including property line regulations, were unnecessary.[10] EPA there determined that a property line regulation was unnecessary, because existing regulations adequately controlled the major railroad noise sources.

---

[9] We have reproduced in the Appendix, *infra*, a comparison of the original Senate provision and the final House provision (which was enacted), with all distinctions identified.

[10] The state here apparently seeks to control only the increase in noise level at the Wilsmere facility resulting from the operation of the TOFCs (see page 2, *supra*). The federal standards apply to six types of railway equipment (40 C.F.R. 201.11-201.16), not including TOFCs. There is thus no existing analogous federal regulation.

As this Court has noted, "because agencies normally address problems in a detailed manner and can speak through a variety of means, including regulations, preambles, interpretive statements, and responses to comments, we can expect that they will make their intentions clear if they intend for their regulations to be exclusive." *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, No. 83-1925 (June 3, 1985), slip op. 10. That approach, which reflects "the federal-state balance embodied in [the Court's] Supremacy Clause jurisprudence" (*ibid.*), leaves little room for equating a mere statement that a particular EPA regulation is "unnecessary" with a conclusion that the area involved must remain free of state regulation.

Instead, the agency's preemptive intent must be determined more specifically on the basis of its public statements. In its December 1982 *Federal Register* notice—its last pronouncement on the general subject of Section 17 regulations—EPA stated that the previously promulgated standards had addressed the major sources of noise from railyard operations, and observed that as a result "it was agreed [by the parties and intervenor to the *AAR* litigation] that it is unnecessary for EPA to establish further property line facility emission standards." 47 Fed. Reg. 54108 (1982). In that context, the agency had no need to, and did not, indicate that its conclusion that further standards were "unnecessary" was intended to preclude state or local regulation of types of equipment not subject to federal regulation. The agency's simple statement that it was withdrawing its proposed property line standard, in conjunction with the settlement and voluntary dismissal of the *AAR* litigation,[11] does not evince a clear intention to

[11] Because both parties agreed to the dismissal in *AAR*, the case was dismissed by the clerk of the court pursuant to Fed. R. App. P. 42; the agreement was not ratified by the court of appeals.

make the agency's regulations exclusive. See *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, slip op. 10.

Moreover, the particular litigation situation in which the federal regulations were considered and withdrawn further counsels against an assumption here that the agency's decision not to regulate implicitly determined that the area must remain unregulated by local authorities as well. See, *e.g.*, *Arkansas Elec. Coop.* v. *Arkansas Public Service Comm'n, supra.* The federal regulations were proposed here in response to a judicial directive, which issued after the court rejected the agency's contention that the area should be left to state regulation. See, *e.g.*, 41 Fed. Reg. 2184, 2185 (1976). In this peculiar context, the subsequent agency decision that these regulations were "unnecessary" scarcely has the force, for preemptive purposes, of the typical agency decision not to regulate.[12]

---

[12] Nor is this a situation in which a pervasive federal regulatory presence leads naturally to the conclusion that any gaps in those regulations are an intentional part of a comprehensive federal regulatory system. Since the 1982 promulgations, EPA has undertaken little substantive activity in the area of noise control, although it recently revised a previously promulgated standard for heavy and medium trucks, in response to a petition from the industry. 51 Fed. Reg. 850 (1986) (granting a two-year delay in the effective date of the standards, but also making the standards more stringent when they do take effect). See also 49 Fed. Reg. 26738 (1984) (correcting minor inconsistencies in previously promulgated final rule); 48 Fed. Reg. 27039 (1983) (same). The agency currently has no plans to develop any additional noise control regulations and has not been given appropriations by Congress for that purpose.

CONCLUSION

Because the court of appeals may have relied on the position espoused by the government in that court, it should have the opportunity to reconsider the issue in light of the views we have here expressed.[13] Accordingly, the judgment of the court of appeals should be vacated and the case remanded for further proceedings.

Respectfully submitted.

CHARLES FRIED
Solicitor General
F. HENRY HABICHT II
Assistant Attorney General
PETER R. STEENLAND
RAYMOND B. LUDWISZEWSKI
KAREN L. FLORINI
Attorneys

FRANCIS S. BLAKE
General Counsel
Environmental Protection Agency

NOVEMBER 1986

[13] See also note 6, *supra*.

All addition
indicated by

Senate Lang

Notwithstan
provision of
after the eff
regulations

no State or
subdivision
or enforce a
respecting n
resulting fro
of [] equipm
of *surface* c
interstate co
railroad
unless such
identical to
applicable t
resulting fro
prescribed b
under this s

APPENDIX A

are italicized; omissions are
brackets.

iage (Sec. 513):	House Language:
ling any other this *Act,* ctive date of nder this *part,*	*Subject to paragraph (2) but* notwithstanding any other provision of this *chapter,* after the effective date of *a* regulation[] under this *section applicable to noise emissions resulting from the operation of any equipment or facility of a surface carrier engaged in interstate commerce by railroad,*
olitical hereof may adopt y standard ise emissions n the operation ent or facili*ties* rriers *engaged in* *mmerce by*	no State or political subdivision thereof may adopt or enforce any standard *applicable to* noise emissions resulting from the operation of *the same* equipment or facilit*y* of *such* carrier[]
tandard is standard noise emissions n such operation any regulation ction:	unless such standard is identical to a standard applicable to noise emissions resulting from such operation prescribed by any regulation under this section.

Provided, however, That nothing in this section shall diminish or enhance the rights of any State or political subdivision thereof to establish and enforce standards or controls on levels of environmental noise, or to control, license, regulate, or restrict the use, operation, or movement of any product *as* the Administrator, after consultation with the Secretary of Transportation *may* determine[] *to be*

necessitated by special local conditions *or* not in conflict with regulations promulgated under this *part*.

(2) Nothing in this sect
shall diminish or enha
rights of any State or
political subdivision th
to establish and enforc
standards or controls
levels of environmenta
or to control, license,
regulate, or restrict the
operation, or moveme
product *if* the Adminis
after consultation with
Secretary of Transport
determines that such s
control, license, regula
or restriction is
necessitated by special
conditions *and* not in
with regulations promu
under this *section*.

U.S. GOVERNMENT PR

on
ce the

reof

n
noise,

use,
t of any
rator,
the
tion,
ndard,
ion,

ocal
onflict
lgated

TING OFFICE 1986—181-483:40057

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

Supreme Court, U.S.
FILED
NOV 21 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1773

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

CHARLES M. OBERLY, III and JOHN E. WILSON, III,
Appellants

v.

BALTIMORE & OHIO RAILROAD COMPANY, *et al.*,
Appellees

On Appeal From The United States Court of Appeals For The Third Circuit

APPELLEES' REPLY TO THE BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

DUANE, MORRIS, & HECKSCHER
William E. Manning, Esquire
1220 Market Building
P.O. Box 195
Wilmington, Delaware 19899
(302) 571-5550

PACKARD PRESS / LEGAL DIVISION, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

TABLE OF CONTENTS

	Page
Statement	1
Argument	3
Conclusion	9

TABLE OF AUTHORITIES

Cases: Page

Association of Am. R.R. v. Costle, 562 F.2d 1310 (D.C. Cir. 1977) ..... *passim*

Baltimore & O.R.R. v. Oberly, 606 F. Supp. 1340 (D.Del. 1985), *aff'd*, 782 F.2d 29 (3d Cir. 1986) 2

Other Authorities:

Noise Control Act of 1972, 42 U.S.C. (& Supp. II) §§4901 *et seq.* 1

§16, 42 U.S.C. §4915..... 4

§17(c)(1), 42 U.S.C. §4916(c)(1) 5, 7

§17(c)(2), 42 U.S.C. §4916(c)(2) 5

44 Fed. Reg. 22,960-22,972 (1979)..... 7

45 Fed. Reg. 1,252 (1980)..... 7

40 C.F.R. pt. 201 (1983)..... 7

118 Cong. Rec. 37,318 (1972)..... 6

Status Report, *Association of Am. R.R. v. Costle*, No. 76-1353 (D.C. Cir. Nov. 12, 1981) 8

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

CHARLES M. OBERLY, III and JOHN E. WILSON, III,
Appellants

v.

BALTIMORE & OHIO RAILROAD COMPANY, ET AL.,
Appellees

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

APPELLEES' REPLY TO THE BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This reply brief is filed in response to the brief filed by the Solicitor General of the United States as *Amicus Curiae*.

STATEMENT

At its roots, this case involves the State of Delaware's quarrel with the method for regulating railroad facility noise selected by the Environmental Protection Agency (EPA) pursuant to the Noise Control Act of 1972 (the Act), 42 U.S.C. (& Supp. II) §§4901 *et seq.* Delaware officials have appealed from decisions below holding that, under the Act, the EPA's regulatory scheme, including its decision to reject a regulatory method which Delaware prefers and seeks to impose, preempts Delaware's authority to regulate the same railroad facilities. Appellees have moved to affirm and have demonstrated that, contrary to Appellants' claims, this case involves no important question of federal law; there is no discord

among the circuits concerning any issue in this case and the decisions below were correct.

No further response to Appellants' argument is required.[1] Instead, this brief will respond only to the Brief For The United States As *Amicus Curiae* filed by the Solicitor General on November 10, 1986 (U.S. Brief), which reverses the position taken by his client agency before the court of appeals below.[2] The Solicitor General now seeks a remand "[b]ecause the Court of Appeals may have relied on the position espoused by the government in that court. . . ." U.S. Brief at 13. Appellees note that the district court, in a carefully reasoned opinion, *Baltimore & O.R.R. v. Oberly*, 606 F. Supp. 1340 (D. Del. 1985) (reprinted in Appendix to Jurisdictional Statement at page 1[3]) granted a preliminary injunction unaided by the United States' former or current views and that the court of appeals affirmed "for the reasons noted in Judge Stapleton's opinion." *Baltimore & O.R.R. v. Oberly*, 782 F.2d 29, 30 (3d Cir. 1986), A-20. The EPA's agreement with the district court's conclusions was additionally "note[d]" by the court of appeals only in passing. *Id.* Nevertheless, Appellees offer this response to the U.S. Brief for the sake of completeness.

---

1. The positions of the parties in respect of these issues have been set forth in Appellants' Jurisdictional Statement, Appellees' Motion to Affirm and Appellants' Brief in Reply to Motion to Affirm.

2. The Solicitor General has represented that the United States' current position differs with its position taken one year ago before the court of appeals because of a "regret[able] . . . failure of communication within the Department of Justice." U.S. Brief at 6 n.6. More particularly, the brief filed in the court of appeals was not reviewed by the then-Solicitor General or the Assistant Attorney General for Land and Natural Resources, the latter whose name appears on both briefs. Appellees note that the EPA's General Counsel appears on both briefs as well, although his apparent endorsement of the EPA's position before the court of appeals has not been attributed to a "failure of communication."

3. Herein, all citations to Appendix refer to Appendix in Jurisdictional Statement and shall be in the form "A-__".

ARGUMENT

A. The Solicitor General Apparently Agrees That This Case Involves No Important Questions Of Federal Law.

The Solicitor General's brief announces two new positions: (1) the United States now quarrels with the interpretation of the Act uniformly rendered by the two lower courts as well as the Circuit Court of Appeals for the District of Columbia in *Association of Am. R.R. v. Costle*, 562 F.2d 1310 (D.C. Cir. 1977) (herein *AAR*); (2) the EPA, in its rulemaking, did not have the "preemptive intent" suggested by its statements five years ago to the court in *AAR*.

Appellees believe these new positions to be incorrect on both counts. See *infra* Section C. Before pointing out, however, their differences with the U.S. Brief, Appellees note areas of apparent agreement. The Solicitor General apparently agrees that:

— this case involves no federal constitutional questions;
— this case involves no "threat to federalism", as Appellants have urged; and
— there is no discord among the circuits as to matters involved in this case.

Instead, the issues are reduced under the Solicitor General's new view to questions of statutory interpretation as well as the interpretation of administrative utterances and activities.

B. The United States Now Seeks To Attack Collaterally A Ten-Year-Old Holding Binding Upon a Federal Agency From Which No Appeal Was Taken.

In its initial rulemaking following the enactment of the Act, the EPA assumed it had the discretion to regulate noise from *less than all* railroad equipment and facilities depending upon its view of whether local standards would be appropriate in certain cases. Fearing

the denial of the Act's broad preemptive protection from a hotchpotch of varying and contradictory local regulations, the Association of American Railroads challenged the EPA on this point and petitioned the Court of Appeals for the District of Columbia for relief. That is the only court, under the Act, that may entertain any petition for review of agency actions taken pursuant the Act. Section 16 of the Act, 42 U.S.C. §4915.

The Court of Appeals for the District of Columbia, after carefully reviewing the Act and its legislative history, held that the EPA did not have such discretion and, instead, Congress had already determined, within the Act, that the interests of interstate commerce could only be served by the nationally uniform regulation of all railroad equipment and facilities. *AAR*, 562 F.2d at 1318.

No appeal was taken by the EPA. Instead, it returned to its rulemaking and promulgated the current regulations. The Solicitor General's new claim that *AAR* was wrongly decided, *see* U.S. Brief at 7 n.7, constitutes a collateral attack upon an unappealed decision otherwise binding upon the EPA. Moreover, in seeking a remand to the Court of Appeals for the Third Circuit, the Solicitor General asks for permission to press his collateral attack in a forum not otherwise available under the Act.

Finally, in joining in the U.S. Brief, the EPA seeks to avoid its representations to the *AAR* court attesting to its faithful compliance with the court's order. See *infra* Section C3. Appellees respectfully submit that the United States should not, as *amicus curiae*, be granted this forum in an attempt to avoid the implications of its status as a *party* to *AAR*.

C. The Solicitor General's Views On The Merits Are Incorrect.

1. The United States, by its own account, demonstrates that its new, narrow view of the Act's preemptive

scope is inconsistent with the Congressional objective of nationally uniform regulation. The Solicitor General concedes that:

> "[T]he state should probably be preempted from indirectly, as well as directly, regulating equipment and facilities that are federally regulated."

U.S. Brief at 7 n.8. Appellees agree and submit that a state property line standard[4] which controls total facility noise, including noise emitted by railroad equipment undeniably governed by specific federal standards (*e.g.* railroad locomotives), constitutes just such an indirect local regulation of federally regulated equipment. Despite this clear threat of conflicting regulations, the Solicitor General now urges a construction of Section 17(c)(1) of the Act that would subject our hypothetical railroad locomotive to different standards in every town, county and state through which it passed. This new construction clearly cheats the Congressional expectation behind the Act.

2. The Solicitor General, in suggesting such a narrow construction, overlooks convincing evidence that Congress understood the preemptive sweep of the railroad noise provisions of the Act to be quite broad. Senator Tunney's remarks, the source of legislative history proferred by the Solicitor General in his brief, makes this clear. In discussing Section 17(c)(2) of the Act — the provisions providing relief to states with special local conditions — Senator Tunney stated that this section was engrafted onto the legislation because of its otherwise broad preemption:

> "I have reviewed the amendment and it is in conformity with what the committee intended. The

4. "Property line standards" are standards governing total noise levels at the boundary of railroad facilities rather than standards for individual pieces of equipment within those facilities which require measurement at or near such equipment.

> report states there is a complete preemption and also orders the administrator in conjunction with the Secretary of Transportation to grant exemptions where there are special local conditions. So it is clear it is a total preemption.
>
> • • •
>
> It [the authority for EPA to regulate railroad noise emissions] was not initially in the bill, so we put in the preemption so that we would give the railroads and the carriers some awareness and some security that they would not have to abide by 50 different State jurisdictions and Lord knows how many tens of thousands of local jurisdictions. It is in the bill now. It is a complete preemption."

118 Cong. Rec. 37,318 (1972). None of the excerpts from the Congressional Record now cited in the U.S. Brief, including other statements by Senator Tunney, diminish the value of the above-quoted passage as authoritative evidence of Congressional intent to preempt, once the EPA had acted, state regulation of railroad noise.

Nor does either the language of the Act or the legislative history indicate that Congress intended to foreclose the EPA's ability to select among alternative methods for controlling railroad facility noise. Appellees assume that all parties, as well as *amicus curiae*, agree that there is more than one method of controlling noise emanating from railroad facilities. On the one hand, one might propose to limit noise levels at a facility's boundary regardless of the sources and levels of noise within the facility. In the alternative, one might seek to control the noise travelling across the facility's boundary by prescribing standards for noise produced within the facility at its sources. As indicated earlier, the question in this case is whether Congress intended to foreclose the EPA's ability to select among these (and perhaps other) options. Nothing in the Act or legislative history suggests that Congress so intended. In fact, the language of the Act, in

committing to the EPA questions of "best available technology" and "cost of compliance", signals that Congress left the selection of methodology to the EPA. *See*, Section 17(c)(1) of the Act, 42 U.S.C. §4916(c)(1).

3. Finally, the Federal Government now urges that the EPA's "preemptive intent" was narrow and that, despite its articulation of its position in 1981, the EPA never intended to preclude the enforcement of state property line regulations. Nowhere, however, does the Act leave to the EPA a determination of whether its set of regulations should or should not preempt local regulation. That question of legislative policy was already answered by Congress in the Act, and the EPA's views as to whether its regulations should, as a matter of policy, preempt state law are irrelevant. Instead, one should look to the EPA's contemporaneous statements only to determine what railroad equipment and facilities are governed by EPA regulations.

One has only to listen to the EPA's words, offered to the court in *AAR*, to conclude that, in its judgement at the time of rulemaking, the EPA had done as instructed by the *AAR* court and regulated *all* railroad equipment and facilities.

After the decision in *AAR*, and pursuant to the court's instructions, the EPA proposed further regulations including properly line standards similar to standards which the State of Delaware now seeks to impose on Appellees' facility. 44 Fed.Reg. 22,960-22,972 (1979). Following a comment period, the final (and current) regulations were promulgated. 45 Fed.Reg. 1,252 (1980), 40 C.F.R. pt. 201 (1983). The proposed property line standards for railroad facilities were not included in the final regulations.

In a report to the *AAR* court, the EPA listed the regulations that were promulgated, both before and after the court's ruling, and stated:

> Respondents believe that the cumulative effect of these standards, which were based on the noise abatement achievable through the application of the best available technology taking into consideration the cost of compliance, effectively regulate both railroad equipment and railroad facilities. The standards promulgated to date cover the major sources of noise from railroad equipment which in turn generate a large proportion of the noise emissions from rail facilities.
>
> Since the cumulative effect of regulating equipment used within railyards is also to regulate to a significant degree noise emissions from rail facilities, the parties agree that it is unnecessary for EPA to establish further property line facility emission standards specifically for railyards.
>
> In consideration of these facts, EPA intends to withdraw its proposal to promulgate a property line standard for rail facilities. Respondents agree with Petitioner AAR that EPA has already effectively regulated railroad "equipment and facilities". . . .

Status Report, *Association of Am. R.R. v. Costle*, No. 76-1353 (D.C. Cir. Nov. 12, 1981), A-77-80.

Appellees do not understand how one could conclude anything other than that the EPA, in 1981, judged its regulations to reach all railroad equipment and facilities. Indeed, any other conclusion suggests that the EPA was unfaithful to the court's instructions in *AAR*.

Even though Appellees disagree with the Solicitor General's recent claim that *AAR* was incorrectly decided, it should be noted here that the correctness of that decision is wholly irrelevant to a determination whether the EPA did as its words suggest. Correctly or not, the EPA was instructed to regulate "all railroad equipment and facilities". *AAR* at 1316. The EPA returned to the court saying it had done just that. Thereafter, the Act, and not

the EPA, declares that states may not impose an infinite variety of competing regulations upon such railroad equipment and facilities.

CONCLUSION

The Solicitor General apparently agrees that there is no substantial federal question involved in this case. He attempts, however, to use the United States' status as *amicus curiae* to collaterally attack well-reasoned determinations of legislative intent and statutory meaning made by a court singled out by Congress for such questions. Moreover, the United States' revisionist views are simply incorrect. Appellees' Motion to Affirm should be granted.

Respectfully submitted,

DUANE, MORRIS & HECKSCHER

By: _____

William E. Manning, Esquire
1220 Market Building
P.O. Box 195
Wilmington, Delaware 19899
(302) 571-5550

Dated: Nov. 21, 1986